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In the Supreme Court of the United States

OCTOBER TERM, 1976

MAURICE H. SIGLER, CHAIRMAN,
UNITED STATES PAROLE COMMISSION, ET AL.,
PETITIONERS

v.

ARTHUR E. BYRD, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Chairman of the United States Parole Commission and the Parole Executive of the Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-56a) is reported at 534 F.2d 353. The opin-

ion of the district court (App. E, *infra*, pp. 68a-89a) is reported at 372 F. Supp. 889.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 57a-58a) was entered on March 23, 1976. A petition for rehearing was denied on June 9, 1976 (App. C, *infra*, pp. 59a-60a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Parole Commission's procedures for considering the status of parolees who are convicted and imprisoned for crimes committed while on parole comport with the Due Process Clause.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution provides in part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

Pertinent provisions of statutes and regulations appear in Appendix F, *infra*, pp. 90a-97a.

STATEMENT

1. This case involves the procedures used by federal authorities to decide whether and when to revoke the parole of a person who, while on parole, is

convicted of additional crimes. The facts with respect to each respondent are similar, and they are not seriously disputed.

a. On May 28, 1965, respondent Byrd was convicted of robbery by the United States District Court for the District of Columbia. He was sentenced to a term of 3 to 12 years' imprisonment (App. E, *infra*, p. 73a). He was paroled on June 14, 1971, after serving six years and one month of this sentence (*ibid.*).

On July 6, 1972, while on parole, Byrd was convicted of armed robbery by the United States District Court for the District of Columbia (*ibid.*). He was sentenced to a term of 4 to 20 years' imprisonment, to run concurrently with any other sentence then being served (*ibid.*). Byrd was incarcerated at Lorton Correctional Complex; a parole violator warrant was issued and lodged against him as a detainer. Following a dispositional review conducted pursuant to former 28 C.F.R. 2.53 (App. F, *infra*, pp. 95a-97a), the Board of Parole [1] notified Byrd that no action would be taken on the warrant until he had completed the 1972 sentence (App. E, *infra*, p. 74a).[2]

b. In November 1963 respondent Fitzgerald was convicted of bank robbery by the United States District Court for the Middle District of Pennsylvania. He was sentenced to 10 years' imprisonment (App. E, *infra*, p. 71a). On May 22, 1970, Fitzgerald was

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[1] Now the United States Parole Commission. See Pub. L. 94-233, 90 Stat. 219.

[2] Byrd still is incarcerated at Lorton on the 1972 sentence.

mandatorily released by virtue of "good time" accumulated pursuant to 18 U.S.C. 4163 (*ibid.*). Under 18 U.S.C. 4164 a prisoner so released is treated as a parolee until the expiration of his maximum sentence.

On August 31, 1972, before the expiration of his maximum sentence, Fitzgerald was convicted of robbery by the United States District Court for the District of Columbia. He was sentenced to a term of 3 to 12 years' imprisonment, to run concurrently with any other sentence to which he might be exposed (App. E, *infra*, pp. 70a-71a). He was incarcerated at Lorton Correctional Complex, and an earlier parole violator warrant, which was amended to include this offense, was lodged against him as a detainer.[3] On May 14, 1973, a dispositional review of Fitzgerald's case was conducted, and on May 24, 1973, he was informed by the Board of Parole that no action would be taken on the detainer until expiration of the intervening sentence (*id.* at 71a-72a).[4]

c. On January 21, 1963, respondent Kelley was convicted of armed robbery of a post office by the

[3] On July 27, 1970 (two months after Fitzgerald's mandatory release), the Board issued a warrant alleging that he failed to report for supervision. He was arrested on March 15, 1971, and, on March 19, 1971, the warrant was amended to refer to the criminal offense.

[4] On April 24, 1974, Fitzgerald was released on parole. Because of the district court's order quashing the outstanding warrant, no steps have been taken to revoke his release from the 1963 sentence, pending the outcome of proceedings on remand in the district court (see n. 9, *infra*).

United States District Court for the Eastern District of Missouri. He was sentenced to 25 years' imprisonment (App. E, *infra*, p. 72a). He was released on parole on June 3, 1971 (*ibid.*).

While on parole from that offense, Kelley was convicted in June 1972 of attempted robbery by the District of Columbia Superior Court; he also was convicted in August 1972 of armed robbery by the United States District Court for the District of Columbia. He was sentenced to concurrent terms of one to three years' imprisonment for the attempted robbery and 3 to 15 years' imprisonment for the armed robbery (App. E, *infra*, pp. 72a-73a). Kelley was incarcerated at Lorton Correctional Complex, where a parole violator warrant reflecting these offenses was lodged against him as a detainer. After a dispositional review the Board advised him in August 1973 that it planned to review the status of his detainer in approximately one year (App. A, *infra*, p. 5a).[5]

2. On November 7, 1973, respondent Fitzgerald began this case by filing a petition for a writ of habeas corpus (*ibid.*). As amended on December 31, 1973, to add respondents Byrd and Kelley, the peti-

[5] Apparently unaware of the district court's decision, the Board conducted another dispositional review on January 9, 1975, again deciding that the detainer would remain in effect. Kelley was paroled from his 1972 sentences on June 10, 1975. Because of the court's decision quashing the outstanding warrant, no steps have been taken to revoke his parole from the 1963 sentence, pending the outcome of proceedings on remand in the district court (see n. 9, *infra*).

tion contended that respondents were prejudiced by the Board of Parole's practice of not holding an oral parole revocation hearing promptly after an intervening conviction.[6] They argued primarily that the delay frustrated the intention of the sentencing courts to have the intervening sentences run concurrently with any other sentences then being served.[7] The district court rejected this argument (App. E, *infra*, pp. 83a-84a). It held, however, that *Morrissey* v. *Brewer*, 408 U.S. 471, requires parole authorities to hold an oral hearing within a reasonable time after a parolee has been incarcerated for an intervening offense (*id.* at 85a-86a). The court quashed the detainers and warrants (*id.* at 86a, 88a).

3. The court of appeals held that parole officials must furnish an oral hearing promptly upon the parolee's request once there has been an intervening conviction.[8] The court first concluded (App. A, *infra*,

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[6] Respondents sought to proceed as class representatives. The district court declined to certify the case as a class action (App. E, *infra*, pp. 86a-87a, 89a), and respondents did not contest this decision on appeal (App. A, *infra*, p. 5a n. 5).

[7] Respondents also claimed that the detainers adversely affected the conditions of their confinement under Lorton policy then in effect. This policy has been changed, and respondents' complaint against the Lorton officials consequently became moot. App. A, *infra*, p. 6a n. 6; App. E, *infra*, p. 70a n. 1.

[8] Respondents' case was consolidated and decided with *Jones* v. *Johnston*, 368 F. Supp. 571 (App. D, *infra*, pp. 61a-67a). We are informed by Jones's counsel and the District of Columbia Department of Corrections that Jones died on October 24, 1974. Because Jones's case has no precedential significance apart from respondents' case, we have not filed a petition for a writ of certiorari as to Jones.

pp. 11a-14a) that because a parolee may suffer loss during the delay between an intervening conviction and an ultimate revocation hearing, he has been deprived of liberty or property within the meaning of the Due Process Clause of the Fifth Amendment. The court then determined that the parolee's potential interests in prompt hearings—accurate decisions on revocation, certainty of future disposition, access to prison rehabilitation programs, and opportunity for earlier release from the intervening sentences—outweighed any interests that the Board of Parole could assert in delaying the hearing until completion of the intervening sentences (*id.* at 16a-42a). The court therefore held that the Board's practice of giving a prompt file review and an eventual oral hearing to all parolees imprisoned for intervening crimes was constitutionally inadequate. It invalidated the statutes and regulations then in effect, even though it acknowledged that "[t]he result in this case is not strictly mandated by *Morrissey*, for missing from it is the interest of the parolee in avoiding unjustified incarceration" (*id.* at 37a).

The court remanded the cases for additional hearings, concluding that the district court should not have quashed the warrants without a demonstration that respondents had been hindered by the delay in their attempts to persuade the parole authorities not to revoke their paroles (App. A, *infra*, pp. 54a-56a).

It held that the warrants should be quashed only if respondents can establish actual prejudice; in the absence of such prejudice, however, the parole authorities must provide respondents with prompt oral hearings.[9]

REASONS FOR GRANTING THE PETITION

The question presented by this case is presently before the Court in *Moody* v. *Daggett*, No. 74-6632, certiorari granted, March 1, 1976. For the reasons set forth in our brief in *Moody*, a copy of which we are sending to respondents, we believe that the Due Process Clause does not require parole revocation hearings after a parolee has been convicted of a crime committed while on parole and that, even if some hearing is required, the procedures of the Parole Commission satisfy all constitutional requirements.

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[9] On August 9, 1976, an evidentiary hearing was held in the district court. Respondents presented evidence in an attempt to demonstrate such prejudice. The district court has not yet rendered its decision on remand. These proceedings, however, do not affect the jurisdiction of this Court. *Commissioner of Internal Revenue* v. *Shapiro*, No. 74-744, decided March 8, 1976, slip op. 11 n. 9. Furthermore, whether or not the district court finds prejudice, its judgment will be adverse to the Commission. If it finds prejudice, it will quash the warrants; if it does not find prejudice, it will order the Parole Cimmission to afford prompt hearings. At least as to respondent Byrd, who has not yet completed his intervening sentence, a judgment directing the Commission to provide a prompt hearing would conflict with the Parole Commission and Reorganization Act (see 18 U.S.C. 4214(b), App. F, *infra*, pp. 93a-94a). This case therefore is ripe for review by this Court.

Therefore, we believe the court of appeals incorrectly concluded that respondents were entitled to oral revocation hearings upon request. Whether we are right or wrong will be determined by this Court in *Moody*, and the result of that case likely will control the disposition of the instant petition. If this Court resolves the issue in *Moody* in the Commission's favor, the decision here cannot stand, and certiorari should be granted in this case and the judgment of the court of appeals should be reversed. On the other hand, if the Court rejects our arguments in *Moody* and holds that the Commission's procedures are inadequate, this petition for a writ of certiorari should be denied.[10]

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[10] If the Court's disposition of *Moody* should leave unanswered the question whether the procedures spelled out in the Parole Commission and Reorganization Act comport with the Constitution, we believe that it would be appropriate to set this case for plenary review; here it is unquestioned that respondents received the dispositional reviews called for by the regulations then in effect (see App. E, *infra*, pp. 71a-72a, 73a, 74a), and these procedures were quite like those now required by statute.

CONCLUSION

Consideration of this petition should be deferred pending this Court's decision in *Moody*, and the petition should be disposed of as appropriate in light of that decision.

Respectfully submitted.

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Attorneys.

SEPTEMBER 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

Nos. 74-1424, 74-1517

WILLIAM HARVEY JONES

v.

STEVE D. JOHNSTON, Executive U.S. Board of Parole,
APPELLANT

ARTHUR E. BYRD ET AL., Individually and on behalf of others similarly situated

v.

MAURICE J. SIGLER, Chairman, ET AL., APPELLANTS

DELBERT C. JACKSON, Director Department of Corrections District of Columbia, ET AL.

Argued April 8, 1975

Decided March 23, 1976

Before McGOWAN and ROBINSON, Circuit Judges, and GUS J. SOLOMON,* Senior United States District Judge for the District of Oregon.

Opinion for the court filed by Circuit Judge McGOWAN.

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* Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

McGOWAN, Circuit Judge:

These appeals present the question of when a prisoner serving a sentence for a crime committed while on parole, and against whom a parole violator warrant has been issued and lodged as a detainer, is entitled to a revocation hearing and determination upon request. The Government, appealing two District Court decisions,[1] insists that hearing and determination may be deferred until the intervening incarceration has terminated, although it accepts the premise that the Constitution requires that a hearing ultimately be provided. We hold that this position does not measure accurately the reach of the Due Process Clause.

I. BACKGROUND

A. *No. 74-1517*

The situations of the three appellees in No. 74-1517 (Fitzgerald, Kelley, and Byrd) are similar in all material respects.

Fitzgerald had been convicted of bank robbery in the Middle District of Pennsylvania in 1963, and after serving just over seven years of his ten year sentence received a mandatory "good-time credit" release pursuant to 18 U.S.C. §§ 4163, 4164 (1970).[2]

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[1] *Jones* v. *Johnston*, 368 F.Supp. 571 (D.D.C. 1974); *Fitzgerald* v. *Sigler*, 372 F.Supp. 889 (D.D.C. 1974). The same conclusion was reached in *Sutherland* v. *District of Columbia Board of Parole*, 366 F.Supp. 270 (D.D.C. 1973).

[2] 18 U.S.C. § 4163 (1970) provides in pertinent part that "a prisoner shall be released at the expiration of his term of sentence less the time deducted for good conduct." A prisoner whose release is mandated by § 4163 prior to the expiration of the maximum term for which he was sentenced is deemed a parolee by § 4164: "A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days."

On July 27, 1970, the U.S. Parole Board issued a parole violator warrant against him for failure to report for supervision; when Fitzgerald was arrested in March, 1971 and charged with robbery in the District of Columbia, the violator warrant was lodged against him as a detainer at his place of incarceration.[3] On March 31, the Board updated the warrant to include an allegation of committing an offense while on parole. Fitzgerald pleaded guilty in District Court to robbery, 22 D.C.Code § 2901 (1967), and was sentenced on August 31, 1972 to three to twelve years, to run concurrently with any other sentence "that [he] . . . might be exposed to." 372 F.Supp. at 892.

The detainer has remained lodged against him to the present, despite several requests by Fitzgerald that the Board hold a prompt revocation hearing. The Board has conducted a "dispositional review" [4] of his

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[3] The purpose of a detainer is to inform the institution that the Parole Board intends to take the prisoner into custody as a parole violator at the completion of his sentence. *See* note 9 *infra*.

[4] An affidavit of Maurice H. Sigler, Chairman, United States Board of Parole, describes the "dispositional review" as follows:

> When the Board requests that a parole or mandatory release violator warrant be placed as a detainer against an

case, and has determined to take no action on the detainer until the intervening robbery sentence has been served and he has been taken into federal custody under the (executed) violator warrant.

Appellee Byrd was paroled on June 14, 1971 from a three to twelve year sentence imposed in 1965 for a robbery conviction. In September, 1971, he was arrested and charged with armed robbery, and was incarcerated in the District of Columbia jail where on November 11 a detainer based on the armed robbery charge was lodged against him. He pleaded guilty to armed robbery on July 6, 1972, and was sentenced to four to twenty years, to run concurrently with any other sentence then being served. The detainer has

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alleged parole or mandatory release violator in custody as a result of a new criminal offense, the Board periodically conducts dispositional reviews of the warrant to determine whether the detainer would be allowed to remain in effect or whether the warrant should be withdrawn or executed. The initial dispositional review of a case is instituted by a request of the prisoner or on the Board's own initiative. It is presently the practice of the Board to conduct subsequent dispositional reviews of each case on an annual basis. If the warrant is executed, the Board will take action to conduct a prompt revocation hearing. In the dispositional review, which is based on the written record only, the Board specifically analyzes the factors enumerated in the attached Parole Form H-3(a), Summary by Case Analyst-Dispositional-Review, in light of the prisoner's record as a whole.

J.A. 40-41.

remained lodged against him at Lorton Reformatory. Byrd's caseworker has requested that the Board take action on the detainer; the Board has responded that the detainer will remain on file, and that periodic dispositional reviews will be undertaken by the Board.

Kelley had received a twenty-five year sentence in 1963 for armed robbery of a post office, from which he was paroled in 1971. On June 23, 1972, he was sentenced in District of Columbia Superior Court to one to three years for attempted robbery, and a parole violator warrant was lodged against him as a detainer. On August 8, 1972, Kelley also was convicted in District Court of armed robbery, and received a sentence of from three to fifteen years, which he is now serving. As is the case with the other two appellees, the detainer has been allowed to stand against Kelley since his conviction. Kelley's prison caseworker submitted to the Board in August 1973 a letter from Kelley requesting action on his detainer, and the Board has advised him that it will conduct periodic dispositional reviews.

On November 7, 1973, Fitzgerald filed the instant action, alleging jurisdiction under 28 U.S.C. §§ 1361, 2241, 2255 (1970), and asking, *inter alia*, that the action be certified as a class action,[5] that the parole violator warrant outstanding against him be quashed, and that the Board be required to hold speedy revocation hearings on all parole violator warrants placed

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[5] The District Court denied class action status, and appellees have not disputed this ruling.

against persons incarcerated for subsequent convictions.[6]

On December 31, 1973, an amended complaint was filed in which Fitzgerald, Byrd and Kelley joined, essentially identical to Fitzgerald's complaint save that jurisdiction was based only on 28 U.S.C. §§ 1361, 2241 (1970). On March 13, 1974, the District Court ruled that (1) petitioners are "in custody" for the purposes of 28 U.S.C. § 2241, (2) the Board was constitutionally required to hold a final revocation hearing within a reasonable time after the detainers had been lodged and the parolees had been incarcerated pursuant to their convictions, and (3) as a consequence of the Board's delay, the detainers and warrants must be quashed. The appeal in No. 74-1517 is taken from these rulings.

B. *No. 74-1424*

On May 17, 1968, appellee Jones was convicted of housebreaking and grand larceny in the District

[6] The complaint also contained an action against the Director of the District of Columbia Department of Corrections and the Warden at Lorton, asking invalidation of Policy 5000 of the Department, which denied certain rehabilitation opportunities to prisoners solely on the ground that a detainer was outstanding against them. During the pendency of the suit, the Department of Corrections adopted Policy 4090, which made a detainer only one of several criteria used in determining eligibility for rehabilitation opportunities. The parties thereupon entered into a stipulation that "[the petitioners] will not be denied a custody classification change solely because of the existence of outstanding detainers," and the judge found the Policy 5000 question to be moot. Appellees do not challenge this finding on appeal.

Court, and was sentenced under the Narcotic Addict Rehabilitation Act (NARA), 18 U.S.C. § 4253 (1970), to an indeterminate term not to exceed ten years. He was released on parole in October of 1969, but five months later the Board of Parole issued a parole violator warrant charging him with failure to comply with the NARA aftercare program, violation of the Harrison Narcotic Act, falsifying a supervision report, and failure to report to his probation officer. That and a supplemental warrant were lodged against Jones at the District of Columbia Jail, where he was being held on a stolen vehicle charge. On January 18, 1971, Jones pleaded guilty to attempted unauthorized use of a motor vehicle, and was sentenced to one year with credit for time served; in September of that year he pleaded guilty to a narcotics offense, and was sentenced to five years imprisonment.

In October of 1971 Jones was transferred to Lorton, where the warrants were lodged against him. After a dispositional review in January, 1972, the Board chose to continue the detainer subject to periodic review. Jones filed the instant action six months later,[7] alleging that he had been denied access to certain rehabilitative programs as a result of the detainer, and in particular that he had been denied on-the-job training. Following a March, 1973 dispositional review at

[7] The action was filed June 16, 1972, but was dismissed on *res judicata* grounds. This court reversed the dismissal on April 30, 1973, and directed that the case be heard on the merits.

which the Board again permitted the detainer to continue in effect, Jones' attorney suggested that the dispute might be settled if the detainer were withdrawn to permit access to rehabilitative programs. The Board acquiesced and withdrew the detainer temporarily to allow Jones to participate in rehabilitative programs, with the understanding that the warrant again would be lodged shortly before the expiration of the intervening sentence. Jones then urged that the warrant be quashed because of the delay in holding a dispositional hearing. On January 9, 1974, the District Court granted Jones' request and ordered that the violator warrant be cancelled for failure to provide a prompt revocation hearing.

II. CUSTODY

Appellants argue that appellees are not "in custody" for the purpose of habeas corpus jurisdiction.[8] This contention, which may have had merit under the "prematurity doctrine" of *McNally* v. *Hill*, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934), has been undercut by later cases. *Peyton* v. *Rowe*, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968) (habeas will lie to challenge future sentence consecutive to that being served); *Smith* v. *Hooey*, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969) (federal prisoner constitutionally entitled to speedy trial on pending

[8] 28 U.S.C. § 2241(e)(3) (1970). "The writ of habeas corpus shall not extend to a prisoner unless—. . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ."

indictment for offense under state law); *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973) (state prisoner is "in custody" for purpose of federal habeas corpus challenge to denial of his constitutional right under *Smith* v. *Hooey* to speedy trial on pending indictment in another state). We hold that a parole violator warrant lodged as a detainer[9] represents sufficient "custody" of a parolee-prisoner to support habeas corpus jurisdiction under 28 U.S.C. § 2241.[10]

[9] The Board argues that Jones' case is different from that of the other three appellees since the detainer lodged against him has been withdrawn and therefore he cannot be said to be in custody for the purposes of § 2241. In *Braden*, *supra*, at 489 n. 4, 93 S.Ct. at 1126-27, 35 L.Ed.2d at 449, the Supreme Court reserved the question whether a detainer must be filed for a prisoner to be "in custody" under an indictment issued by another state. We are not faced, however with a case in which no detainer ever was filed, and we do not address that situation. We believe that where, as here, the future custodian has actually lodged a detainer against a prisoner, thereby evidencing its intent to retake him at the end of his intervening confinement, the state of custody is not ended by a later temporary withdrawal of the detainer. Hence, Jones too is "in custody" for purposes of § 2241.

[10] We note that the question whether a parolee-prisoner is "in custody" when a parole violator warrant has been lodged against him as a detainer has been answered in the affirmative, either expressly or by implication, by all of the circuits presented with the situation. *Gaddy* v. *Michael*, 519 F.2d 669 (4th Cir. 1975), *petition for cert. filed*, (Aug. 5, 1975) (No. 75-5215); *Cook* v. *United States Attorney General*, 488 F.2d 667 (5th Cir. 1974), *cert. denied*, 419 U.S. 846, 95 S.Ct. 81, 42 L.Ed.2d 75 (1974); *United States ex rel. Hahn* v. *Revis*, 520 F.2d 632 (7th Cir. 1975) (mandate withdrawn); *Cleveland* v. *Ciccone*, 517 F.2d 1082 (8th Cir. 1975); *Reese* v.

III. THE RIGHT TO A PROMPT HEARING

In *Morrissey* v. *Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and *Gagnon* v. *Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), the Supreme Court ruled that due process requires a "preliminary" and "final" hearing for revocation of parole or probation. The parties here agree that the need for the preliminary, or "probable cause" hearing is eliminated in these cases by the conviction on the violation charged. The matter in dispute is the timing of the final hearing—may it be delayed until the intervening sentence has been served, or is there a due process right to a determination of an outstanding detainer within a reasonable time after conviction on an intervening charge? [11]

United States Board of Parole, No. 74-2418, 530 F.2d 231 (9th Cir. 1976); *Small* v. *Britton*, 500 F.2d 299 (10th Cir. 1974). *See also Orr* v. *Saxbe*, No. 75-1042, 517 F.2d 1399 (3d Cir. 1975), *petition for cert. filed* (Oct. 10, 1975) (No. 75-5594), *aff'g* Civ. No. 74-341 (M.D.Pa. Nov. 27, 1974); *Colangelo* v. *United States Board of Parole*, No. 75-1249, 517 F.2d 1404 (6th Cir. 1975), *aff'g* Civ. No. C 74-251 (N.D. Ohio Dec. 11, 1974).

[11] Our discussion is narrowed by three considerations. First, the parties concur that the Board may delay the revocation hearing until after completion of a trial for the conduct charged in the violator warrant. *See generally Shelton* v. *United States Board of Parole*, 128 U.S.App.D.C. 311, 388 F.2d 567, 572 (1967). Second, it is agreed that the right to a prompt hearing may be waived, and that the Boad therefore is required only to provide a prompt hearing upon a proper request; if no request is made, the timing of the hearing is wholly within the Board's discretion. Finally, appellees ask only that the Board be required to hold a hearing and announce a decision. They do not challenge, and we do not rule on, the Board's right to postpone the effect of that decision until after the parolee-prisoner has served the intervening sentence. As noted below, pp. ——-—— of —— U.S.App. D.C., at 364 of 534 F.2d & n.31 *infra*, this last agreement does not foreclose inquiry into the problem of concurrent vs. consecutive sentences—; the parolee may believe that a prompt hearing will improve his chances of convincing the Parole Board to let the sentences run concurrently.

Questions of procedural due process require a two-step analysis: first, does the deprivation under challenge constitute a denial of liberty or property within the meaning of the due process clause, and second, if so, upon consideration of the private and governmental interests implicated, is the deprivation unconstitutional? *E. g.*, *Board of Regents* v. *Roth*, 408 U.S. 564, 570-71, 92 S.Ct. 2701, 2705-06, 33 L.Ed.2d 548, 556-57 (1972), *Morrissey* v. *Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972). As to the first half of this analysis, the Court in *Morrissey* found that a parolee's interest in not being incarcerated solely on the basis of an executed parole violator warrant was cognizable under the due process clause.

The instant appeals do not involve prisoners who would be free but for the actions of the Parole Board. We believe, however, that a parolee-prisoner need not assert an interest in immediate liberty to claim the constitutional guarantee of due process. In *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), prison disciplinary proceedings were found to threaten sufficient deprivation (loss of good

time credits) to warrant those due process guarantees which would not impair the internal security interests of the prison.[12] And, in *Smith* v. *Hooey*, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969), the Court noted strong prisoner interests in accuracy, certainty, and the possibility of earlier release in ruling that an accused retained the Sixth Amendment right to a speedy trial despite incarceration for conviction on another charge:

> At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from "undue and oppressive incarceration prior to trial." But the

[12] That the revocation of parole be justified and based on an accurate assessment of the facts is a critical matter to the State as well as the parolee; but the procedures by which it is determined whether the conditions of parole have been breached do not themselves threaten other important state interests, parole office, the police, or witnesses—at least no more so than in the case of the ordinary criminal trial. Prison disciplinary proceedings, on the other hand, take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. . . . They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. . . .

It is against this background that disciplinary proceedings must be structured by prison authorities; and it is against this background that we must make our constitutional judgments, realizing that we are dealing with the maximum security institution as well as those where security considerations are not paramount.

418 U.S. at 561-62, 94 S.Ct. at 2977, 41 L.Ed.2d at 954.

> fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.
>
> And while it might be argued that a person already in prison would be less likely than others to be affected by "anxiety and concern accompanying public accusation," there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large. . . . In the opinion of the former Director of the Federal Bureau of Prisons,
>
> > "[I]t is in their effect upon the prisoner and our attempts to rehabilitate him that detainers are most corrosive. The strain of having to serve a sentence with the uncertain prospect of being taken into the custody of another state at the conclusion interferes with the prisoner's ability to take maximum advantage of his institutional opportunities. His anxiety and depression may leave him with little inclination toward self-improvement."

> Finally, it is self-evident that "the possibilities that long delay will impair the ability of an accused to defend himself" are markedly increased when the accused is incarcerated in another jurisdiction.

393 U.S. at 378-79, 89 S.Ct. at 577, 21 L.Ed.2d at 611. Although we recognize that *Smith* v. *Hooey* is not a "due process" case, it is our view that a prisoner's interest in a speedy trial while incarcerated on another charge is in many ways similar to the interest in a prompt parole revocation hearing in the instant case. The guarantee of due process is surely not so narrow or inflexible as to exclude from its protection the interests—described in more detail at pp. ——-——- of —— U.S.App.D.C., at 360 of 534 F.2d *infra* —asserted by appellees.

We thus turn to considering whether those interests in a prompt hearing, when judged against the Government's asserted interests in delaying the hearing until the intervening incarceration has ended, require the relief appellees seek. We begin by noting that the Government's argument seems to us overstated in one important respect. We believe it is clear —and it may be that the Government would not contend otherwise—that due process requires that a revocation hearing be held sufficiently before the end of the intervening incarceration so that, if the decision of the Board is not to revoke parole, unnecessary incarceration is avoided. Otherwise, a prisoner might be taken into custody after his intervening sentence had expired and pending the Parole Board's determination; and, if that determination were not to revoke parole, the prisoner would have been incarcerated for a not insignificant period of time and with absolutely no justification. Incarceration is always a drastic step, and one's interest in avoiding such a deprivation is of "transcending value." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368, 375 (1970); *Speiser* v. *Randall*, 357 U.S. 513, 525, 78 S.Ct. 1332, 1341-42, 2 L.Ed.2d 1460, 1472 (1958). There is no reason of substance why the Government could not provide a revocation hearing in time to reach a decision before the intervening sentence has expired,[13] and we think it clear that it is

[13] As is discussed more fully below, the Board has only two interests in delaying the provision of a parole revocation hearing. The first, the "administrative interest," has two parts: (A) the burden of holding hearings in distant state prisons where parole violators may be incarcerated on their intervening sentences, and (B) the cost of additional hearings when the Board decides to reevaluate a decision based on prison behavior during the intervening sentence. The second interest —the "oversight interest"—is in ensuring the ability to consider the parolees' interim institutional performance in deciding whether to revoke parole at the end of the intervening sentence. It should be clear that both the second interest and Part B of the first interest are virtually non-existent when the hearing is to be moved forward only far enough to ensure its completion before the expiration of the intervening sentence. As for part A of the first interest, we do not believe it substantial, for reasons stated at pp. ——-—— of —— U.S.App.D.C., at 366 of 534 F.2d *infra*; and we further note that in cases where the decision after hearing is not to revoke parole, the Government may reap the savings of not having to transport the prisoner from one institution to another or to bear the costs of his confinement while the Board's decision is pending. It is clear, then, that the Government can put

required to do so upon request by a parolee-prisoner.[14]

Against that background, the narrow legal question raised by the circumstances of these appeals is highlighted: Are prisoners in appellees' situation entitled to a prompt hearing, or may the Government defer the hearing that must eventually be provided until shortly before the expiration of the intervening sentence? To answer this question we must analyze the private and Government interests in the timing of the hearing.

A. *The Prisoner's Interests*

When, as in these cases, the fact of parole violation has been established by a criminal conviction, the parole revocation hearing does not thereby lose its significance. As the Supreme Court noted in *Morrissey* v. *Brewer*, the Parole Board must determine not only whether there has been a violation, but also whether that violation justifies revocation of parole:

> Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? The first step is relatively simple; the second is more complex.

408 U.S. at 479-80, 92 S.Ct. at 2599, 33 L.Ed.2d at 493. The Court later indicated, in *Gagnon* v. *Scarpelli*, that a parole board should exercise its discretion to appoint counsel for a probation or parole violator who has substantial evidence in mitigation of the violation to present at the revocation hearing:

> Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) *that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.*

411 U.S. at 790, 93 S.Ct. at 1764, 36 L.Ed.2d at 666 (emphasis added).[15]

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forth no interest approaching "transcending value" to justify not scheduling the hearing so as to avoid unjustified incarceration.

[14] We intimate no view on the question whether the Board is constitutionally required to do so absent a specific request.

[15] *See also Cooper* v. *Lockhart*, 489 F.2d 308, 315-16 (8th Cir. 1973); *Caton* v. *Smith*, 486 F.2d 733, 735 (7th Cir. 1973) ("Breach of parole conditions is a necessary but not sufficient ground for parole revocation, for the board is required to de-

Clearly, the final revocation proceeding is a matter of great consequence even to a prisoner whose violation has been established by a criminal conviction.[16]

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termine whether the violator is still a good parole risk, and he may bring extenuating factors to the board's attention."). This court repeatedly has recognized that the dispositional determination is separate from the violation determination. *See, e.g., Hyser* v. *Reed*, 115 U.S.App.D.C. 254, 318 F.2d 225, 240 (*en banc*), *cert. denied sub nom. Jamison* v. *Chappell*, 375 U.S. 957, 84 S.Ct. 447, 11 L.Ed.2d 316 (1963); *Shelton* v. *United States Board of Parole, supra*, 388 F.2d at 575-76. In the *Shelton* decision, this court noted that an intervening conviction obviated the need for a preliminary "probable cause" parole revocation hearing, 388 F.2d at 575, but did not reach the question whether a final hearing must be held within a reasonable time, 388 F.2d at 576. The reasoning of Judge Gesell in *Sutherland* v. *District of Columbia Board of Parole, supra*, 366 F.Supp. at 272, is particularly apposite to this issue:

> The D.C. Board of Parole, like the United States Parole Board under discussion in *Shelton*, retains full discretion to place a parolee back on the street even though he has clearly violated the conditions of his parole. *See* D.C.Code § 24-206; 18 U.S.C. § 4207. The Board must consider mitigating circumstances and rehabilitative potential as well as the existence of parole violations before determining that reincarceration is appropriate. . . . Thus, a revocation hearing to adduce evidence on these matters is of vital importance even to a parolee whose parole violation has already been established by a court of law.

[16] The Parole Board's regulations expressly provide for withdrawal of a detainer lodged against a parolee incarcerated under a new sentence. The pertinent regulation, 28 C.F.R. § 2.53, provides as follows:

> (a) In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised

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> that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. . .
>
> (b) Following the dispositional review the Regional Director may:
>
> (1) Let the detainer stand;
>
> (2) Withdraw the detainer and close the case if the expiration date has passed;
>
> (3) Withdraw the detainer and reinstate to supervision; thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release.
>
> (4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.
>
> (c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct annual reviews relative to the disposition of the warrant. . . .

The common practice apparently is to take alternative (1), and to let the detainer stand. In an affidavit filed with the District Court, Maurice Sigler, Chairman of the United States Board of Parole, reported as follows with regard to the disposition of parole violator warrants lodged as detainers:

> Based on available records, during the last four months of 1973, 30 such cases arose for dispositional review by the Adult Division by the Board. As a result of those dispositional reviews, the Board ordered in 20 cases that the detainer should remain in effect. In 6 cases the Board ordered that the warrant be executed. In 4 cases the Board ordered that the warrant should be withdrawn and the case closed.

App. 40, 41.

The question then becomes what interests the parolee has in having a decision as to the disposition of his parole revocation proceeding—*i.e.*, whether parole will be revoked and, if so, whether revocation will result in imprisonment beyond the expiration of the intervening sentence—made promptly rather than at the end of his intervening sentence. We perceive four categories of interest: accuracy in the determination, certainty of future disposition, access to privileges and rehabilitation programs during the intervening sentence, and potential for earlier release.

1. *Accuracy in the determination*

The parole revocation hearing is a fact-finding process of extremely broad scope.[17] Among the factors that the Board can consider at that hearing, two of the most important from the viewpoint of the parolee-prisoners are mitigating factors attending the violation [18] and personal and social history in the community.[19] The parolee consequently may wish to learn of the Board's information on his behavior and, when appropriate, to challenge that information by presenting his own evidence and witnesses.[20]

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[17] 28 C.F.R. § 2.19 contains a non-exclusive list of ten possible categories of consideration.

[18] *Id.* § 2.19(b)(2).

[19] *Id.* § 2.19(e).

[20] We note, for instance, that in some cases the Parole Board may provide a revocation hearing reasonably near the place of an alleged violation if the "local" hearing would facilitate production of witnesses or retention of counsel and if the

The *Morrissey* decision was grounded in part on the need to protect the fairness and integrity of the parole process; [21] and, as we have noted, express recognition was given in *Gagnon* v. *Scarpelli* to the importance of evidence in mitigation of an offense.[22] Delaying the hearing for the period involved in the intervening sentence may seriously prejudice a parolee's ability to present accurately his side of the story, whether or not a violation has been established conclusively.[23] To

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parolee denies that any violation was committed. *Id.* § 2.55(a). For similar reasons, a parolee incarcerated in a state institution near his home on an intervening sentence may be able to defend himself better in a revocation hearing held at the state institution than at one held after his removal to a federal institution. *See Argro* v. *United States*, 505 F.2d 1374 (2nd Cir. 1974).

[21] The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions. . . . And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.

408 U.S. at 484, 92 S.Ct. at 2601, 33 L.Ed.2d at 496.

[22] *See* p. —— of —— U.S.App.D.C., at 360 of 534 F.2d *supra*.

[23] *See Boswell* v. *United States Bd. of Parole*, 128 U.S.App. D.C. 311 at 315-19, 388 F.2d 567 at 571-75 (one of the appeals consolidated with *Shelton* v. *United States Board of Parole*, *supra*). In *Boswell*, the parolee was denied a revocation hearing while imprisoned on an intervening conviction despite

begin with, the passage of time can make it more difficult for the parolee-prisoner to obtain evidence and testimony bearing on both mitigating factors and reputation in the community. And even assuming that the necessary witnesses can eventually be located, there is the inescapable prejudice that accompanies impaired recollection. Since the prejudice that may be caused by delay will often be difficult to demonstrate at the time of the delayed hearing, we think the interest of the parolee-prisoner in a prompt hearing is entitled to considerable weight.

The Board suggests that its disposition will be more accurate if it is able to consider the parolee's conduct in the prison during his intervening confinement. It is our understanding that the Board retains this power in any event, for it may reconsider at any time a decision to revoke parole and, specifically, may alter its

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the fact that the alleged violation was unrelated to the crime for which he was sentenced. Noting in that situation that "one of the requirements of basic fairness is a prompt hearing where the alleged violator can contest the fact of violation and adduce whatever witnesses or evidence he may have to support his claim of innocence," the court found that the Parole Board was obligated to provide a hearing within a reasonable time:

> We think the issuance of a violator warrant triggers a process which, as a matter of fundamental fairness, must be pursued with reasonable diligence and with reasonable dispatch.

388 F.2d at 574. Delay may also work unfairness, of course, when it impairs a parolee-prisoner's ability to present collateral evidence in a request for leniency.

planned disposition because of interim prison behavior.[24]

In addition to the evidentiary interests discussed above, the parolee validly may conclude that he has an interest in establishing the Board's opinion of his conduct and potential at the start of the intervening confinement, so that any later change in the disposition must be justified specifically by the institutional conduct.

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[24] This is so because the Board may reopen a case at any time for further consideration. 28 C.F.R. § 2.28. And as to subjects open to consideration, *id.* § 2.19 provides in relevant part:

> In the exercise of its discretion, the Board generally considers some or all of the following factors and such others as it may deem appropriate:
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> * * * * *
>
> (d) Changes in motivation and behavior:
>
> (1) Changes in attitude toward self and others;
>
> (2) Reasons underlying changes;
>
> (3) Personal goals and description of personal strength or resources available to maintain motivation for law abiding behavior.
>
> * * * * *
>
> (f) Institutional experience;
>
> (1) Program goals and accomplishments:
>
> (i) Academic;
>
> (ii) Vocational education, training or work assignments;
>
> (iii) Therapy.
>
> (2) General adjustment:
>
> (i) Inter-personal relationships with staff and inmates;
>
> (ii) Behavior, including misconduct.

2. *Certainty of future disposition*

The parolee also has a definite, personal interest in being relieved of uncertainty as to what his future will be. As noted above, the Supreme Court recognized in *Smith* v. *Hooey* [25] that the anxiety and depression resulting from a detainer based on a pending criminal indictment may have a severely corrosive effect on rehabilitation.[26] We have no reason to believe that the effects are any the less significant when the detainer is lodged because of a parole violation.[27]

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[25] 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969).

[26] *See* pp. ——-—— of —— U.S.App.D.C. 358 of 534 F.2d *supra*. We also note that the corrosive effect of uncertainty on prisoners has been one of the factors stressed by the increasing number of commentators critical of indeterminate sentences. *See, e.g.*, M. E. Frankel, Criminal Sentences—Law Without Order 96-97 (1972) ("[I]t is pertinent again to recall how deeply we prize certainty and predictability in the workings of the law. We want to be able to plan our businesses and family decisions by knowing in advance just how painful the tax will be, what the zoning laws promise, how long an employment contract will endure. It may be imagined that knowing the actual length of a prison term might serve similar . . . needs."); J. Mitford, Kind and Usual Punishment 82 (1973) ("[T]he indeterminate sentence [is] a potent psychological instrument for inmate manipulation and control, the 'uncertainty' ever nagging at the prisoner's mind a far more effective weapon than cruder ones. . . .").

[27] *See Cooper* v. *Lockhart*, 489 F.2d 308, 314-15 (8th Cir. 1973); *Sutherland* v. *District of Columbia Board of Parole*, 366 F.Supp. 270, 272 (D.D.C. 1973). *See also Lawrence* v. *Blackwell*, 298 F.Supp. 708, 713-15 (N.D.Ga. 1969) (detainers based on pending indictments); Bennett, "The Last Full Ounce," 23 Fed.Prob. No. 2, at 20 (1959); Note, Detainers and the Correctional Process, 1966 Wash.U.L.Q. 417, 421 at n.22.

That the appellees have not challenged the Board's power to withhold the execution of a revocation decision until the completion of the intervening sentence, and to alter an adverse parole revocation decision on the basis of interim prison behavior, does not gainsay the increased certainty that results from a hearing and decision on the pending detainer.

In the first place, we note that the asserted power of the Board to withhold execution of a revocation decision has no effect on the certainty interest of parolee-prisoners as to whom the Board has made a final decision to withdraw the warrant. In those cases, only subsequent prison conduct constituting a parole violation would justify a later decision by the Board to revoke parole. Moreover, as to those parolee-prisoners who have received an adverse parole revocation decision, we note that consecutive sentences and the ability of the Parole Board to overturn a prior, adverse decision are aspects of prison life we have neither the desire nor the ability to affect. A prompt revocation hearing thus nevertheless serves an important "certainty" interest of the prisoner.

3. *Access to rehabilitative programs*

A detainer lodged against a prisoner may have a particularly damaging effect if it results in denial of access to educational or rehabilitative programs. This issue has been mooted to some extent in the instant case by stipulation of the parties after the District of Columbia Department of Corrections issued new

guidelines for the "inmate custody classification" which determines access to various programs.[28] A detainer no longer will bar admission to rehabilitative programs *automatically;* it will be only one of a large number of factors considered in the classification decision.

We note, however, that even under the new policy a prisoner may have a substantial interest in the removal of a detainer lodged against him. The detainer will continue to be a consideration, and the inmate may never know whether his custody classification

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[28] The new policy contained in Notice 4090 lists twelve "criteria" which will be considered in inmate custody classification: "(a) the nature and seriousness of the offense; (b) sentence structure; (c) prison breach; (d) institutional adjustment; (e) family and community ties and support; (f) prognosis for adjustment in outside institutional assignments and community program [sic]; (g) psychological status, mental and emotional stability; (h) pending case; (i) detainer; (j) forfeiture of statutory good time; (k) prison breach [sic; *see* (c)]; (l) disciplinary action."

That a prisoner may have a substantial interest in the removal of a detainer even when the detainer is only one factor considered by the Parole Board was noted by James V. Bennett, a former Director of the Federal Bureau of Prisons:

> While detainers reduce the incentive for the prisoner to attempt to improve himself, they also affect the institution's readiness to allow an inmate full participation in the program. . . . Today the prisoners with detainers are evaluated individually but there remains a tendency to consider them escape risks and to assign them accordingly. In many instances this evaluation and decision may be correct, for the detainer can aggravate the escape potentiality of a prisoner.

"The Last Full Ounce," 23 Fed.Prob. No. 2, at 21 (1959).

might have been changed had there been no detainer.[29] The potential for prejudice thus created may be of great concern to the prisoner, and creates a substantial interest in a reasonably prompt revocation hearing.[30]

4. *Opportunity for earlier release*

Finally, a prompt hearing and decision would give the parolee-prisoner an opportunity to obtain earlier

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[29] The possible consequences of a detainer were outlined in *Gay* v. *United States Board of Parole,* 394 F.Supp. 1374, 1377 (E.D.Va. 1975):

> First, the presence of the federal detainer imposes substantial constraints upon a parolee's liberty even when the parolee is incarcerated on a state charge. If the parolee is incarcerated while awaiting trial on the state charges, he may be unable to make bond because of the detainer. If the parolee is convicted on the state charge and incarcerated in the state correctional system, he may be denied the privilege of participating in certain rehabilitative programs, such as furlough and work release, because of the presence of the federal detainer. A prisoner with a federal detainer can never be assigned to trusty status, nor assigned to a job where the level of custody is low. . . . The presence of a federal detainer "unquestionably" affects a state prisoner's eligibility for parole.

[30] The Board argues that Jones' interests in a prompt hearing are reduced because the detainer has been withdrawn and consequently there are no adverse effects from that detainer. We agree that the amount of deprivation suffered by an inmate is less when a detainer has been removed. The interests of the parolee in accuracy, certainty, and possible earlier release, however, remain, and we are persuaded that the Board should not be able to subvert the instant decision by withdrawing a violator warrant that has been issued and reissuing it years later for the same offense.

release from prison. The Board argues that, given its power to delay execution of the warrant following a revocation decision, any benefits of an early decision in the concurrent sentence situation are illusory. There are two answers to this contention.[31]

First, the fact that the judge who imposes the intervening sentence cannot impose on the Board a requirement that the intervening sentence run concurrently with the original sentence [32] does not mean that the judge is powerless to enforce his intent as to the total sentence to be served. If the Board announces its decision to revoke parole, but to force the original and intervening sentences to run consecutively by delaying execution of the warrant, the parolee then could return to the sentencing judge to request a reduction in sentence to approximate the original in-

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[31] Preliminarily, we note that the fact that the Board *can* delay execution does not mean that it will, and presumably there are certain situations in which the Board will find delay inappropriate. For example, the parolee's ability to present a case for prompt execution by the Board may be hampered severely by the effects of delay. Thus, the Seventh Circuit found in *United States ex rel. Hahn* v. *Revis*, 520 F.2d 632 (7th Cir. 1975) (mandate withdrawn) (discussed *infra*) that a parolee-prisoner may have a substantial interest in a timely opportunity to convince the Board that his sentences *should* be permitted to run concurrently. We treated this interest in accuracy of the Board's determination at pp. ——-—— of —— U.S.App.D.C. 361 of 534 F.2d *supra*.

[32] *See Tippitt* v. *Wood*, 78 U.S.App.D.C. 332, 140 F.2d 689 (1944); *Mock* v. *U.S. Board of Parole*, 120 U.S.App.D.C. 248, 345 F.2d 737 (1965).

tended result.[33] Insofar as the Board may seek to deny effect to the sentencing judge's intent that the sentences run concurrently, the parolee has a very great interest in obtaining a revocation decision so that he can return to the court and request a modification of his sentence.

Second, a parolee validly may conclude that an outstanding detainer will lessen his chances of securing parole from the intervening sentence. *See Gay* v. *United States Board of Parole*, 394 F.Supp. 1374, 1377 (E.D.Va. 1975) ("The presence of a federal detainer 'unquestionably' affects a state prisoner's eligibility for parole."); *United States ex rel. Hahn* v. *Revis*, 520 F.2d 632, 637 (7th Cir. 1975) (mandate withdrawn); *Cooper* v. *Lockhart*, 489 F.2d 308, 314 n.10 (8th Cir. 1973). A decision not to revoke would remove the detainer and thereby aid his efforts to be released from the intervening sentence; a decision to revoke, and to impose consecutive sentences, may influence the intervening custodian to consider a plea for earlier release.

As we have noted several times, an early adverse decision will not result in a fixed future course; the Board remains able to change its determination based on information later received. It is clear, however, that the possibility of a future change in disposition is but a factor affecting the weight of the interests in certainty and earlier release, and by no means eliminates them. In *Wolff* v. *McDonnell*, discussed above,

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[33] *Tippitt* v. *Wood*, *supra*, 140 F.2d at 692; *Mock* v. *U.S. Board of Parole*, *supra*, 345 F.2d at 739.

the Supreme Court granted to prisoners facing loss of good time credits in disciplinary hearings those due process rights which were compatible with the serious internal security and administrative interests of the prison officials. The Court expressly held that, although the deprivation of good time credits has uncertain future effect,[34] still it is a deprivation which must be preceded by whatever elements of a fair hearing are practicable in the situation. 418 U.S. at 560-61, 94 S.Ct. at 2976-77, 41 L.Ed.2d at 953-54.

Although the interest in earlier release is concededly substantial, the Board repeatedly has expressed its belief that, in general, a parolee will obtain a better disposition if he receives the delayed hearing. We cannot accept the Board's assertion that a parolee's desire to have a prompt hearing should be submerged in reliance on the benevolent intent of the parole officers. As the Supreme Court noted in *Gagnon* v. *Scarpelli*, *supra*:

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[34] For the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee. The deprivation, very likely, does not then and there work any change in the conditions of his liberty. It can postpone the date of eligibility for parole and extend the maximum term to be served, but it is not certain to do so, for good time may be restored. Even if not restored, it cannot be said with certainty that the actual date of parole will be affected; and if parole occurs, the extension of the maximum term resulting from loss of good time may affect only the termination of parole, and it may not even do that.

418 U.S. at 560-61, 94 S.Ct. at 2977, 41 L.Ed.2d at 953.

> [A]n exclusive focus on the benevolent attitudes of those who administer the probation/parole system when it is working successfully obscures the modification in attitude which is likely to take place once the officer has decided to recommend revocation. Even though the officer is not by this recommendation converted into a prosecutor committed to convict, his role as counsellor to the probationer or parolee is then surely compromised.

411 U.S. at 785, 93 S.Ct. at 1761, 36 L.Ed.2d at 663.

B. *The Board's Interests*

The Parole Board primarily has argued in these cases that a prisoner-parolee does not have a substantial interest in a prompt revocation hearing, rather than asserting an affirmative interest in delay. The Board has, however, emphasized its "punishment" interest in delaying execution of a warrant to lengthen total imprisonment, an "administrative" interest in avoiding travel to distant places of incarceration and duplicative hearings, and an "oversight" interest in consideration of prison conduct during the intervening sentence.

Appellees have not challenged the ability of the Board to delay the implementation of a revocation decision so as to have the intervening and (the unserved portion of) the original sentence run consecutively. Their asserted interest is in the prompt decision alone; the Board's "punishment" interest in de-

laying execution therefore is not material.[35] As a result, we must consider the Board's "administrative" and "oversight" interests in delay.

1. *Administrative Interests*

The Board might assert two administrative interests in delaying revocation hearings until the completion of intervening sentences: (1) the difficulty and

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[35] *Compare United States ex rel. Hahn* v. *Revis, supra,* in which a federal detainer was lodged against a state prisoner who was serving both a four-month state sentence for acts done while on parole from the federal sentence, and a longer state term for crimes committed prior to his federal sentence. The Court of Appeals held that the *Zerbst* case would justify a delay in execution of the detainer only until the four-month "intervening" state sentence was completed:

> In *Zerbst* v. *Kidwell,* 304 U.S. 359, 362-63, 58 S.Ct. 872, 82 L.Ed. 1399 (1938), the Supreme Court identified a policy reason why the unexpired term of a parole violator should not begin to run from the date he is "imprisoned for a new and separate offense" so that "a parole violator can be required to serve some time in prison in addition to that imposed for an offense committed while on parole." Although the question presented in *Zerbst* arose out of an intervening federal sentence, the philosophy expressed would equally justify delay in execution of a federal parole violation warrant until termination of imprisonment for a state offense committed during release on parole. In the instant case, however, petitioner's sentence for the state offense committed on parole was only four months, ending at the latest in October, 1973. The *Zerbst* philosophy would be irrelevant after that point, since his continued state imprisonment was the result of conduct which took place before his federal sentence was imposed.

520 F.2d at 636.

expense of conducting hearings in distant state prisons where parole violators may be incarcerated on their intervening sentences;[36] and (2) the cost of additional hearings when the Board decides to reevaluate a decision made at the commencement of an intervening sentence on the basis of prison behavior.

The transportation problem is not unique to the parolee imprisoned for a new sentence. The Supreme Court in *Morrissey* v. *Brewer* also faced the problem of parolees under supervision in a distant state, yet due process was held to require a preliminary hearing "reasonably near the place of the alleged parole violation" before removal to the original place of imprisonment for a final revocation hearing. 408 U.S. at 485, 92 S.Ct. at 2602, 33 L.Ed.2d at 496. The Court had occasion in *Gagnon* v. *Scarpelli* to respond to assertions of practical difficulties caused by the *Morrissey* decision:

> Petitioner argues, in addition, that the *Morrissey* hearing requirements impose serious practical problems in cases such as the present one in which a probationer or parolee is allowed to leave the convicting State for supervision in another State. Such arrangements are made pursuant to an interstate compact adopted by all of the States . . . .
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> Some amount of disruption inevitably attends any new constitutional ruling. We are confident, however, that modification of the interstate compact can remove without undue strain the more

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[36] This is, of course, not the case here.

serious technical hurdles to compliance with *Morrissey*. An additional comment is warranted with respect to the rights to present witnesses and to confront and cross-examine adverse witnesses. Petitioner's greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the States from holding both the preliminary and the final hearings at the place of violation or from developing other creative solutions to the practical difficulties of the *Morrissey* requirements.

411 U.S. at 782 n.5, 93 S.Ct. at 1760, 36 L.Ed.2d at 662. Given the procedural flexibility of the hearing required by *Morrissey*, we are unpersuaded that the transportation interest is a substantial objection to a requirement of prompt revocation hearings.[37] In fact, the Board's own regulations reflect the need for a certain degree of procedural flexibility despite the additional expense; as we noted earlier, the regulations authorize holding a revocation hearing reasonably near the place of an alleged violation if the "local"

[37] *See also Smith* v. *Hooey, supra*, 393 U.S. at 380 n.11, 89 S.Ct. at 578, 21 L.Ed.2d at 612-13, in which the Court rejected a claim that there were practical problems in transporting a prisoner to another state to stand trial on a pending indictment.

hearing would facilitate production of witnesses or retention of counsel and if the parolee denies that any violation was committed. 28 C.F.R. § 2.55(a); *see* note 20 *supra*.

Present practice is for the Board to hold annual dispositional reviews of outstanding unexecuted warrants lodged as detainers.[38] It therefore would not appear to be a substantial additional burden to require a prompt revocation hearing, nor does it appear that an end-of-sentence "re-evaluation" hearing would require greater expense than the current system. Indeed, we note that the expense of such a "re-evaluation" hearing applies only to those parolee-prisoners who have received *adverse* revocation decisions. Moreover, the Government is spared the expense of dispositional reviews for those parolee-prisoners who have received favorable parole revocation decisions.

Perhaps most to the point, however, is the fact that the transportation burden would have to be assumed in any event. For, as we noted above, it seems plain that a hearing has to be held sufficiently before the expiration of the intervening sentence to eliminate the risk of unjustified incarceration. *See* pp. —— —— of —— U.S.App.D.C., 359 of 534 F.2d *supra*. The question is merely one of the timing of a hearing that must to some degree precede the expiration of that sentence, and the Board has no interest whatsoever

[38] 28 C.F.R. § 2.53(c), reprinted in pertinent part at note 16 *supra*.

in postponing the burden of transportation whose assumption is ultimately inevitable.[39]

2. *The Oversight Interest*

Appellants argue that the Parole Board should have discretion to delay the final hearing to enable it to "consider the record of the parolee's interim institutional performance in determining whether to revoke the parole at the end of the intervening sentence or to continue or modify the parole status." (Appellants' Br. at 28). In essence, the Board seeks to condense two determinations into one. The first determination is whether, on the basis of the facts underlying the violator warrant, parole should be revoked; the second is whether events during the intervening incarceration warrant a different disposition. Many parolees may wish that the Board make this combined decision, believing that they may avoid revocation through good behavior in prison. We do not, however, deny them the ability to leave that course open to the Board. We hold only that when a parolee requests a prompt hearing and decision, he is entitled to one.

We have noted that a parolee may have a substantial interest in focusing the revocation hearing on the conduct surrounding the violator warrant. When the violation is relatively minor, and he has exceptional

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[39] We recognize that deferring that burden gives the Board the economic advantage of reaping the benefit of use of the funds whose outlay for transportation is delayed, but we believe any interest is *de minimis* at most and need not be seriously considered.

references from his community, he may fear that delay in presenting the references will prejudice his case. If the parolee believes that incorrect adverse information has been lodged with the Board, he may conclude that a delay will prejudice his ability to challenge the information or to confront witnesses. Or, when the parolee has a strong case to avoid revocation, he may decide to try for an immediate decision in his favor so as to reduce the risk that prison behavior will prejudice his case.

We repeat that an early decision adverse to the parolee-prisoner will not prevent the Board from later reconsideration in light of the record of the parolee-prisoner's interim institutional performance. If, however, the prisoner's interests are served by an early decision and whatever inertial force it carries, the reason for the Board's desire to avoid any decision prior to completion of the intervening sentence escapes us.

C. *Conclusion*

The result in this case is not strictly mandated by *Morrissey*, for missing from it is the interest of the parolee in avoiding unjustified incarceration, an interest the importance of which we have already stressed. Yet although the prisoner interests are of a different nature in this case, we believe that they are of substantial importance. They involve the fairness of procedures afforded individuals within the criminal process—fairness reflected in both the importance of presenting a full and accurate evidentiary record

to the Parole Board and the symbolic importance of not unfairly leaving a prisoner uncertain about when he may expect to return to society. They involve the prisoner's interest in not having the denial of participation in rehabilitative programs or the debilitating effects of uncertainty about his future deprive him of the opportunity to rehabilitate himself in preparation for an orderly adjustment to the world outside. And while provision of a prompt hearing in these ways aids the prisoner, it also serves society by preserving the integrity of the criminal process and furthering the community goal of rehabilitation that, along with other objectives, is the very basis for invocation of the criminal sanction.

As or more important is the fact that the Parole Board has presented no reason of any force whatsoever to justify delaying a hearing that the parolee has requested. For the question presented is not—as in *Morrissey*—whether due process requires a hearing not otherwise provided, but *when* a required hearing must be held. If there were Government arguments of substance as to why delay was necessary,[40] we

[40] Because our decision is grounded on considerations of due process, we reject the argument advanced by the Board that the applicable statutes do not grant the right to a hearing until the violator warrant has been executed. This argument proceeds as follows: 18 U.S.C. § 4207 provides that "[a] prisoner *retaken* upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board" (emphasis added), and the process of "executing" a warrant is defined in 18 U.S.C. § 4206 as "taking such prisoner and returning him to the custody of the Attorney General." Although it is now understood that the "opportunity to appear before the Board" implies a timely opportunity, the statutory requirement arises only when the prisoner is retaken on the warrant, after completion of his intervening sentence.

We have no occasion to decide whether the lodging of a detainer suffices to "retake" the prisoner within the terms of the statute. The issuance of a violator warrant, as we noted in *Shelton* v. *United States Board of Parole, supra,* "triggers a process which, as a matter of fundamental fairness, must be pursued with reasonable diligence and with reasonable dispatch." On the balancing of interests presented herein, we find constitutionally impermissible denial of the right to a prompt revocation hearing solely because of intervening incarceration.

would find this to be a harder case. But the asserted justifications for delay are so groundless as to make it clear that the due process clause requires a prompt hearing upon request.[41]

The absence of a Government interest of any significance in delaying the hearing until the expiration of the intervening sentence also answers the possible suggestion that parolees should have to present some specific allegation or proof that delaying a hearing will cause prejudice before a hearing is required. Concededly, in some cases a parolee might be able to allege specifically that because of the detainer's being lodged, he is likely to be denied participation in rehabilitation programs, or the opportunity for early

[41] We do not disturb our prior holding that the Board reasonably may await the outcome of criminal charges concerning the acts alleged in the violator warrant. *Shelton* v. *United States Board of Parole,* 388 F.2d 567 (1967).

We reserve, without deciding, the question whether a parole revocation hearing must be held within a reasonable time after a possible parole violation is brought to the Board's attention.

parole, in respect of his intervening sentence. And in some cases he may be able to gather the information necessary to make a showing that he will be prejudiced in presenting evidence of mitigating circumstances or good reputation that might influence the Board not to exercise its power to revoke parole. But in other cases the prisoner may have difficulty while under incarceration, and without any legal assistance, in comprehending the relevant issues and making out the kind of showing that would be prepared by a party who is at liberty and represented by counsel. Simply stated, this requirement may be unrealistic when considered against the circumstances of the prisoner. Moreover, it is not the case that a parolee will automatically have his parole revoked, after an intervening conviction, unless he can affirmatively establish some extenuating circumstances; rather, after the parolee presents evidence that he thinks will aid his case, the Board possesses broad discretion in deciding whether to revoke parole.

There are, furthermore, certain kinds of prejudice to prisoner interests that exist across the board and thus do not require case-by-case documentation. In every case the prisoner's interest in avoiding uncertainty will be implicated. In every case the prisoner might wish to be able to petition the sentencing judge on the intervening sentence, present to him the decision of the Board, and ask him to modify the sentence he imposed in light of the Board's action. And in every case, there is a substantial possibility that delay will impair presentation of a full and

accurate record to the Board, prejudice that may escape attempts at anticipation, discovery, and demonstration. These interests alone seem to us far more weighty than the chimerical interests asserted by the Government.

Finally, we note that a rule requiring demonstration of prejudice could result in undercutting the Board's interests by adding another layer to the hearing procedure. The Board would be required to give careful consideration to petitions alleging that the circumstances presented by each parolee-prisoner claiming a right to a hearing. *Pro se* petitions are often inartfully drawn, and fair and thorough consideration of whether particular prisoners should be granted a hearing would require considerable effort. Denials of requests for hearing would be subject to judicial review, and anyone familiar with the flood of habeas corpus petitions that are filed by prisoners will have little difficulty predicting that the Government would find itself having to defend against an enormous number of actions brought in District Court seeking to overturn the Board's denial of a hearing. If the District Court reverses, the hearing will have to be held in any event; if it affirms, still more proceedings may lie in the appellate court; and if the Government finally prevails, all of the effort required to do so will merely delay, not eliminate, the holding of a hearing. Thus, the suggestion that prejudice must be shown is not only both unrealistic and inconsistent with a careful con-

sideration of the relevant private and Governmental interests, it is also likely to end up imposing at least as great a burden on the Government as the requirement of a hearing upon request.

IV. DECISIONS IN OTHER CIRCUITS

The issue addressed in this appeal has been considered by eight other courts of appeals. Six circuits have held that *Morrissey* does not require the Parole Board to provide a revocation hearing to a parolee convicted and incarcerated on an intervening charge prior to completion of the intervening sentence.

In *Small* v. *Britton*, 500 F.2d 299 (10th Cir. 1974), the Tenth Circuit reaffirmed its holding in *Simon* v. *Moseley*, 452 F.2d 306 (1971) that "while a revocation warrant must be executed within a reasonable time . . . incarceration in a state institution [is] . . . a good reason for delay in the execution of a warrant." The court agreed with the Fifth Circuit that a parolee is not taken into custody until after a parole revocation warrant has been executed, and held that *Morrissey* rights are triggered only by execution of the detainer, rather than by its issuance:

> As to [the final] . . . hearing the Court merely stated that it be afforded "within a reasonable time after the parolee is *taken into custody.*" (Emphasis added). *Morrissey, supra* [408 U.S.] at 488, 92 S.Ct. at 2604.

> A federal parolee is not taken into custody until after the parole revocation warrant has been *executed. Accord, Cook* v. *United States Attorney General*, 488 F.2d 667 (5th Cir. 1974). 18 U.S.C.A. § 4207 provides that a parolee is entitled to a hearing only after he is "*retaken* upon a warrant." (Emphasis added). . . .
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> In summary, we conclude: (1) the *Morrissey* decision requires that a revocation hearing be held within a reasonable time after the parolee is taken into custody; (2) a parolee is not "taken into custody" until the revocation warrant has been executed; (3) *Morrissey* does not require that a revocation warrant be executed immediately after it has been issued; and (4) incarceration in a state institution is a good reason for delay in the execution of a warrant.

500 F.2d at 301-02.[42] We do not believe that the Court in *Morrissey* meant by the words "taken into custody" [43] to condition prisoners' due process rights on the technical requirement that a warrant be executed, when an unexecuted warrant may have a substantial impact on the prisoner against whom it is

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[42] The Tenth Circuit's position was reaffirmed in *Moody* v. *Daggett*, No. 75-1199 (10th Cir. May 7, 1975). In that case, the court, citing *Small* v. *Britton, supra*, denied a prisoner's petition for leave to proceed in forma pauperis. The Supreme Court has granted certiorari in that case. —— U.S. ——, 96 S.Ct. 1408, 47 L.Ed.2d 347, 44 U.S.L.W. 3493 (1976).

[43] Although the Tenth Circuit has concluded that a parolee is not in custody for purposes of 18 U.S.C. § 4207 (1970), it nevertheless recognizes that a parole violator warrant lodged as a detainer represents sufficient custody of purposes of habeas corpus jurisdiction. *Small* v. *Britton, supra.*

lodged. The Supreme Court did not consider the circumstance of a prisoner who already is in custody on another charge, and, while we agree that our result is not commanded by the language of the *Morrissey* decision, we also believe that it is the duty of this court to uphold a claim of right when it is supported by the balancing of interests approved in that decision.

In *Cook* v. *United States Attorney General*, 488 F.2d 667 (5th Cir. 1974), *cert. denied*, 419 U.S. 846, 95 S.Ct. 81, 42 L.Ed.2d 75 (1974), the Fifth Circuit based its decision that the Parole Board could wait until an intervening sentence was completed before holding a parole revocation hearing on the conclusion summarized above, namely, that "*execution* of the warrant is the operative factor in triggering the availability of the revocation hearing." *Id.* at 671. The court recognized that a detainer may cause anxiety, problems in rehabilitation, and denial of educational opportunities, but noted that the prisoner had not demonstrated actual prejudice from the six-year delay prior to his revocation hearing, and chose to defer to the administrative expertise of the Parole Board."

" The Court reasoned as follows:

> In concluding that the deferral of the hearing did not deprive Appellee of any rights prescribed by *Morrissey*, we emphasize that Appellee has not shown that he was prejudiced by the delay. . . .
>
> Appellee also contends that he was prejudiced during the term of his intervening sentence in that the presence of . . . a detainer results in the deprivation of certain prison privileges such as trustee status and various educational opportunities. We are unable to conclude on this record that the extent of such deprivation is so great or so unreasonably related to the very existence of a detainer—based as it is in this case on a serious and incontestable parole violation—as to require that the revocation hearing be held at the commencement of the intervening sentence. . . .
>
> Appellee also asserts that the deferral of the revocation hearing coupled with the presence of the detainer caused him great anxiety and interfered with the rehabilitation process since it is difficult for a parolee to become motivated while laboring under the uncertain prospect of further imprisonment following completion of his current sentence. We are simply unqualified, unauthorized, and willing to second guess the Parole Board on a matter so peculiarly within its own expertise.
>
> We do not close our eyes to the fact that Appellee may have been disadvantaged in certain respects by the deferral of the revocation hearing but we are unable to conclude that the disadvantage constitutes such a grievous loss—in due process terminology—as to require the hearing be held prior to service of the intervening sentence or to permit the intrusion by a Court into this highly discretionary activity.

488 F.2d at 673.

The *Cook* holding was reaffirmed in *Trimmings* v. *Henderson*, 498 F.2d 86 (5th Cir. 1974), *cert. denied* 420 U.S. 931, 95 S.Ct. 1135, 43 L.Ed.2d 405 (1975).

We cannot concur with either the Fifth Circuit's conclusion as to the balancing of interests or as to the degree of deference which must be shown actions of a parole board. The Board has presented no substantial interests to justify the delay of revocation hearings until the completion of intervening sentences, and when the issue is presented in that pos-

ture we cannot deny relief on a general claim of "agency expertise." In *Hyser* v. *Reed*, 115 U.S.App. D.C. 254, 318 F.2d 225, 240 (1963), *cert. denied sub nom. Jamison* v. *Chappell*, 375 U.S. 957, 84 S.Ct. 447, 11 L.Ed.2d 316 (1963), this court stated a principle we affirm without hesitation, that "the exercise of discretion in determining whether or not parole should be revoked . . . represents a very high form of expert regulatory and administrative judgment and the expert appraisal of the Parole Board in this area can be regarded as almost unreviewable." Our unwillingness to intrude into the Board's decision on the disposition of a parole violation, cited with approval by the court in *Cook*,[45] did not constrain the *Hyser* court from reviewing the procedures used by the Board in conducting preliminary interviews, or from establishing requirements therefor. So in the instant case, where it appears that a procedure regularly employed by the Board results in substantial harm to parolees for no countervailing purpose, we cannot countenance the continuance of the practice on an unelaborated claim of "administrative expertise."

The Fourth Circuit joined the Fifth and Tenth in *Gaddy* v. *Michael*, 519 F.2d 669 (1975), *petition for cert. filed*, (Aug. 5, 1975) (No. 75-5215) also upholding the rule that when a warrant has been properly issued within the maximum term of the original sentence, the execution of the warrant may be held

[45] 488 F.2d at 673 n. 13.

in abeyance during the service of an intervening sentence. We read the Fourth Circuit's decision, however, to be sufficiently flexible so as not to preclude agreement with our result in the proper fact situation.

In *Gaddy*, the court of appeals rejected a strict rule that the Parole Board must hold and dispose of a revocation hearing within two months of the issuance of a parole violator warrant. Gaddy never objected to the delay in executing his warrant, *id.* at 678, and the court refused to grant relief on delay alone,[46] reasoning that he "could not 'sleep on his administrative remedies for fear that he has no case and then claim prejudice by reason of the passage of time.'" *Id.*

The most recent of this group of cases is the Ninth Circuit's decision in *Reese* v. *United States Board of Parole*, No. 74-2418, 530 F.2d 231 (1976). *Reese* affirmed the denial of relief to two prisoners who had been denied parole revocation hearings during intervening sentences, and who petitioned that the warrants be quashed for unreasonable delay. The court noted that neither *Morrissey* nor the pertinent statute (18 U.S.C. § 4207) expressly requires a prompt hearing in the intervening sentence situation, then argued that the prisoners did not have a substantial due process interest in prompt hearings.

[46] *See* pp. ——-—— of —— U.S.App.D.C., 374 of 534 F.2d *infra* for our discussion of the issue whether delay alone justified quashing the warrants in this case.

The *Reese* court discussed prisoner interests in prejudice from loss of evidence and from the inability to present mitigating factors, and rejected them as insubstantial. As to the first, it was argued that when a parolee is convicted of a crime committed on parole, "[t]he parole officer is then fairly entitled to assume that all evidence upon which the parolee was legally entitled to rely was presented and considered." at p. 234. This, as we have noted above, simply is not the case. The Parole Board considers a very broad range of evidence in the parole revocation decision, much of which would be irrelevant or inadmissible at a criminal trial—the parolee is "legally entitled to rely" on evidence which has no bearing on the conviction itself but which supports his argument that parole should not be revoked despite his conviction. The prisoner's interest in presenting mitigating evidence was brushed aside with the comment that "there are few, if any, suffering penal confinement who do not find such circumstances to explain their own plight," and with the notation that the prisoners' petitions had not identified mitigating evidence they intended to present. The Ninth Circuit's repudiation of the parolee's interest in presenting mitigating evidence disregards both (1) the recognized distinction between the Board's determination that a violation has occurred and its determination whether to revoke parole and (2) the Supreme Court's clear statement in *Gagnon* v. *Scarpelli* that even when a parole or probation violation is undisputed, the violator may have a sufficient case in mitigation of the violation to deserve appointment of counsel at a revocation hearing."[47]

The parolee's interests in certainty, access to rehabilitation programs, and the possibility of earlier release were not considered by the *Reese* majority. Judge Duniway, writing in dissent, emphasized the importance of these omitted factors:

> A detainer can be, and usually is, detrimental to the prisoner. It is, or can be, held against him by the prison authorities and the parole authorities of the jurisdiction where he is imprisoned. It may result in loss of valuable privilege, and in having to serve his full terms in

[47] Judge Duniway filed a dissenting opinion in the *Reese* case in which he endorsed the positions taken by the Seventh and Eighth Circuits, discussed below. On the importance of evidence in mitigation of the offense, Judge Duniway responded to the majority as follows:

> It is not for us to assume, as the majority opinion does, that a hearing in these cases would be a waste of time because we can conceive of no mitigating circumstances in these cases that would justify lifting the detainer or executing it so as to make the remaining parole term concurrent with the new term. Our discretion is not involved, nor are our notions as to what mitigating circumstances may exist. The discretion belongs to the Board of Parole; so does the decision as to whether there are mitigating circumstances and, if so, what are to be the consequences. . . . Under these circumstances, we have no way of knowing whether the failure to hold a hearing was "prejudicial." To decide that question, we would have to guess what the Board might have done if it had had a hearing. If due process requires a hearing, its denial is prejudicial.
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> At p. 237.

> prison when he would otherwise have been released. . . . Moreover, the United States Board of Parole has discretion as to whether to revoke parole at all for a violation and also as to the terms it will impose if it does revoke parole. Not every parole violation, even one based on conviction of an offense while on parole, results in parole revocation. . . . If a prompt hearing is held, the detainer may be lifted. Alternatively, the board may decide to "execute" the warrant, so that the parolee can serve his reinstated time concurrently with the time that he is serving under the new conviction.

At p. 237. The majority did not base its decision on countervailing interests of the Parole Board; it did no more than assert that the parolee's interests were unimportant and better left to the "coordinated plan of the United States Board of Parole." *Id.* at 236.

The Third and Sixth Circuits have affirmed by order district court opinions which denied a right to a prompt revocation hearing. In *Colangelo* v. *United States Board of Parole*, No. 75-1249, 517 F.2d 1404 (6th Cir. 1975), *aff'g* Civ. No. C 74-251 (N.D. Ohio Dec. 11, 1974), the District Court had held that *Morrissey* did not require a revocation hearing prior to completion of an intervening sentence, relying in part on *Cook* v. *United States Attorney General*, *supra*. In *Orr* v. *Saxbe*, No. 75-1042, 517 F.2d 1399 (3d Cir. 1975), *petition for cert. filed* (Oct. 10, 1975) (No. 75-5594), *aff'g* Civ. No. 74-341 (M.D.Pa. Nov. 27, 1974), the Third Circuit affirmed a conclusion that the presence of a federal parole violator war-

rant had not caused such a "grievous loss" to the parolee when lodged against him at a Massachusetts state prison as to require a revocation hearing prior to completion of his Massachusetts sentence.

The Seventh and Eighth Circuits have reached conclusions substantially similar to our own. In *United States ex rel. Hahn* v. *Revis*, 520 F.2d 632 (7th Cir. 1975) (mandate withdrawn),[48] the parolee repeatedly had requested that the Parole Board hold a revocation hearing during his intervening sentence, noting that both federal and state judges had recommended that his sentences be served concurrently. The court adopted the Eighth Circuit's conclusion that the effects of a detainer were sufficient to constitute "grievous loss," citing the following grounds:

> We recognize that a detainer may result in a loss of privileges while a prisoner is serving a sentence, and that it may substantially diminish the prisoner's prospects for parole. . . .
>
> Other elements of grevious loss, resulting from the outstanding detainer and the delay in the opportunity to remove it, include impairment of rehabilitation, possible prejudice in opportunity to defend against charge of violation or to demonstrate mitigating circumstances, and risk of a longer total period of imprisonment.

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[48] Shortly after the Seventh Circuit announced its decision in *Revis*, the Government filed a motion asking that court to recall its mandate on the ground that given a conflict among the circuits it was not unlikely that the Supreme Court would grant a petition for certiorari in *Gaddy* v. *Michael*, *supra*, to consider the very issue decided in *Revis*. The motion was granted on August 27, 1975. No. 74-1057 (Fairchild, C. J.).

Id. at 637. The *Hahn* court found a strong showing of prejudice in that the parolee had been denied the opportunity to persuade the Parole Board to execute his warrant and to allow the sentences to run concurrently. Even though it was expressly recognized that the Parole Board, after deciding to revoke parole, retained the discretion to delay execution of the warrant until the completion of the intervening sentence (thereby denying concurrent running of the sentences), the Seventh Circuit concluded that due process required that the parolee be given a timely opportunity to attempt to influence the Board:

> Obviously there is no point in relitigating the fact that a violation occurred. Yet it is not a foregone conclusion that parole will be revoked. . . . This is true even when the violation involves serious criminal conduct. . . . Accordingly, notwithstanding incarceration for another offense, the violator has a substantial interest in presenting facts in mitigation of the violation that would influence the Board either to set aside the violation warrant or execute it giving him the benefit of concurrent sentences.

In 1973 the Eighth Circuit held that the punitive effects of a detainer lodged against a prisoner because of a pending parole revocation proceeding in another state violate a parolee's due process rights if the latter state refuses to determine the question of revocation until the prisoner completes his intervening sentence. *Cooper* v. *Lockhart*, 489 F.2d 308. In the more recent case of *Cleveland* v. *Ciccone*,

517 F.2d 1082 (1975), the court went beyond *Cooper* to hold that "federal prisoners are entitled to reasonably prompt hearings on federal parole or release violation warrants and . . . the heretofore frequent practice of deferring such hearings until the expiration of an inmate's intervening sentence violates due process of law." *Id.* at 1083. It was noted that the Fifth and Tenth Circuits had held that no statutory right to a hearing arises until after execution of the warrant has occurred, but the court held that due process requirements of *Morrissey* and *Wolff* required independent consideration of the interests involved:

> The possibility that parole may not be revoked after the hearing, or that, if parole is revoked, the original term may be served concurrently with the intervening sentence, the impact of a delayed hearing upon the prisoner's rehabilitation, as well [as?] the potential loss of evidence that may occur during a long delay, are all important interests now firmly recognized in the balancing process which due process entails.

Id. The court found further support for its rejection of the "technical distinction" made by the Fifth and Tenth Circuits in the Supreme Court's holding in *Armstrong* v. *Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66 (1965) (on facts otherwise inapplicable to the present case), that "[a] fundamental requirement of due process is "the opportunity to be heard." . . . *It is an opportunity which*

must be granted at a meaningful time and in a meaningful manner."

We concur with the conclusion of the Seventh and Eighth Circuits that a parolee-prisoner is denied his due process right to a hearing "at a meaningful time and in a meaningful manner" if, over his objection, the hearing is not held until the completion of his intervening sentence.

V. REMEDIES

The delay attendant upon the failure to provide the hearings requested in these cases raises the question whether it was either necessary or appropriate to quash the parole violator warrants by reference to the fact of delay alone, as did the District Court. This court has already indicated that in answering that question "actual prejudice *vel non* [should be] the focal point of the inquiry." *Shelton* v. *United States Board of Parole, supra*, 388 F.2d at 574. We specifically noted in *Shelton* that "delay will not in and of itself suffice to show prejudice, except in an extreme case. *Id. See Cleveland* v. *Ciccone, supra*, 517 F.2d at 1089 ("Absent a showing of demonstrated prejudice severe enough to render the revocation hearing itself inadequate in terms of relief, we cannot say that the warrants should have been quashed or other habeas relief granted to preclude revocation of the paroles involved in this case.").

We therefore vacate the judgments quashing the warrants and remand the cases to the District Court

to provide appellants with an opportunity to show that they have suffered actual prejudice in their attempts to adduce mitigating evidence and testimony and that they are thus entitled to have their parole violator warrants quashed.[49]

If the District Court determines that an appellant has failed to prove actual prejudice, the case should be returned to the Parole Board with directions to hold a hearing [50] within a reasonable time.[51] *See Gagnon* v. *Scarpelli, supra*, 411 U.S. at 791, 93 S.Ct. at 1764, 36 L.Ed.2d at 666-67; *Morrissey* v. *Brewer, supra*, 408 U.S. at 490, 92 S.Ct. at 2604-05, 33 L.Ed. 2d at 499-500. In that respect, we adhere to our

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[49] Our reliance on demonstrated prejudice as a factor favoring quashing the warrant is not inconsistent with our earlier observation that prejudice is often difficult to demonstrate and that therefore a prompt hearing is necessary to ensure that the determination reflects a full and accurate presentation of all relevant evidence. That observation illustrates the importance of holding a prompt hearing, the failure to do so in the future will be amenable to the remedy of a judicial direction that a hearing be held. The remedy of quashing intrudes on Government interests much more severely than the remedy of providing the hearing, for it deprives the Government of its normal discretion in parole matters.

[50] The structure of the hearing should be based upon the structure of the revocation hearing outlined in *Morrissey, see* 408 U.S. at 489, 92 S.Ct. at 2604, 33 L.Ed.2d at 499, as amplified by more recent decisions of the Supreme Court and this court.

[51] A "reasonable time" in this instance may, of course, reflect any realistic difficulties encountered in dealing with a temporary increase in the number of hearings which must be conducted following this opinion.

ruling in *Shelton*, *supra*, that the Board too, in deciding whether to revoke parole, must "take into consideration the unavailability of mitigating evidence and testimony occasioned by its delay in holding the revocation hearing and a proffer as to what evidence or testimony appellant would have adduced but for the delay." 388 F.2d at 574.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

[Filed Mar. 23, 1976, United States Court of Appeals for the District of Columbia Circuit, George A. Fisher, Clerk]

Civil 1211-72

No. 74-1424

WILLIAM HARVEY JONES

v.

STEVE D. JOHNSTON, Executive U.S. Board of Parole, APPELLANT

Civil 2018-73

No. 74-1517

ARTHUR E. BYRD, et al., Individually and on behalf of others similarly situated

v.

MAURICE J. SIGLER, Chairman, et al., APPELLANTS
DELBERT C. JACKSON, Director, Department of Corrections District of Columbia, et al

Appeals from the United States District Court for the District of Columbia

Before: McGowan and Robinson, Circuit Judges and Gus J. Solomon,* Senior United States District Judge for the District of Oregon

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from in these causes are vacated and the cases are remanded to the District Court for further proceedings in accordance with the opinion of this Court filed herein on March 23, 1976.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: March 23, 1976

Opinion for the Court filed by Circuit Judge McGowan.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

[Filed Jun. 9, 1976, United States Court of Appeals for the District of Columbia Circuit, George A. Fisher, Clerk]

Civil Action 1211-72

No. 74-1424

WILLIAM HARVEY JONES

v.

STEVE D. JOHNSTON, Executive U.S. Board of Parole, APPELLANT

Civil Action 2018-73

No. 74-1517

ARTHUR E. BYRD, et al., Individually and on behalf of others similarly situated

v.

MAURICE J. SIGLER, Chairman, et al., APPELLANTS
DELBERT C. JACKSON, Director, Department of Corrections District of Columbia, et al

Before: McGowan and Robinson, Circuit Judges; Solomon*, Senior U.S. District Judge for the District of Oregon.

ORDER

On consideration of the petition for rehearing, or in the alternative for stay of mandate filed by appellants Steve D. Johnston and Maurice J. Sigler, et al. and of the opposition filed with respect thereto, it is

ORDERED by the Court that appellants' aforesaid petition for rehearing, or in the alternative for stay of mandate is denied.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

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* Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 1211-72

Jan. 9, 1974

WILLIAM HARVEY JONES, PLAINTIFF

v.

STEVEN JOHNSTON, Parole Executive, United States Board of Parole, et al., DEFENDANTS

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

Plaintiff, an inmate at the District of Columbia Correctional Complex at Lorton, Virginia, seeks a Declaratory Judgment that Defendant Johnston, Parole Executive for the United States Board of Parole, acted unlawfully in failing to execute or withdraw a parole violation warrant lodged as a detainer against Plaintiff at Lorton. In light of the Board's failure to make a final determination on the alleged parole violation and its refusal to afford Plaintiff a hearing, he seeks an order cancelling the warrant. The Court has decided to treat Plaintiff's pro se complaint as an application for a writ of habeas corpus directing the United States Board of Parole to cancel the warrant. The Court has concluded that the Plaintiff is entitled such relief and that Defendants' Motion to

Dismiss, or in the alternative, for Summary Judgment must be denied in light of the uncontroverted fact that Plaintiff has not been provided with a parole revocation hearing or even a dispositional interview since the parole violation warrant was first placed as a detainer against him on June 19, 1970. The Board of Parole's decision to maintain the warrant as a detainer in excess of the three years without affording plaintiff a parole revocation hearing violates Plaintiff's right to due process of law under the Fifth Amendment to the United States Constitution. Sutherland v. D. C. Board of Parole, 366 F. Supp. 270, District Court for District of Columbia, 1973.

This Court's jurisdiction is established under 28 U.S.C. § 2241(a), which provides that "[w]rits of habeas corpus may be granted by the . . . district courts . . . within their respective jurisdictions." Plaintiff is physically present within the territorial limits of this Court, as is the United States Board of Parole which is the proper "custodian" of Plaintiff by virtue of the detainer lodged against him. See Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 93 S. Ct. 1123, 35 L.Ed.2d 443 (1973).

The facts of this case which give rise to Plaintiff's due process claim are not disputed. As set forth in the affidavit of Defendant Johnston, submitted pursuant to the Court's order of November 1, 1973 requiring the Board to set forth the reasons for the Board's dispositional course of action with respect to Plaintiff's detainer, it appears that Plaintiff was convicted of Housebreaking and Grand Larceny in the District Court for the District of Columbia on May 17, 1968. He was sentenced under the Narcotic Addict Rehabilitation Act, 18 U.S.C. § 4253(a) to an indeterminate commitment not to exceed ten years. Plaintiff was released on parole from the Residential Treatment Center, Washington, D. C., on October 6, 1969 to remain on parole supervision in the District of Columbia until February 15, 1978. Five months later, on March 31, 1970, the Board of Parole issued a parole violation warrant for Plaintiff, charging him with failure to comply with the NARA aftercare program, violation of the Harrison Narcotic Act, falsifying a supervision report, and failure to report to his Probation Officer as directed. Later supplemental warrant applications filed in 1970 and 1971 by the Board included charges that Plaintiff failed to report his arrest for a narcotics violation and that he made unauthorized use of a vehicle and effected the interstate transportation of a stolen motor vehicle.

The initial parole violation warrant was placed as a detainer against Plaintiff on June 19, 1970, when he was in local custody in the District of Columbia Jail on the stolen motor vehicle charges. When Plaintiff was transferred to the District of Columbia Correctional Complex at Lorton, Virginia, on October 1, 1971, following his conviction for possession of narcotics, the federal parole violation warrant was filed as a detainer there.

At no time since the warrant was placed as a detainer against Plaintiff in 1970 has the United States Board of Parole granted Plaintiff's repeated requests for a *parole revocation hearing or a dispositional interview*. On January 5, 1972, and over a year later on March 12, 1973, the Board conducted *dispositional reviews* of its warrant and ordered the detainer to remain in effect. These determinations adversely affected the condition of plaintiff's confinement since the effect of the detainer was to deny Plaintiff access to rehabilitative programs to which he was otherwise entitled. Although the detainer was withdrawn in August, 1973 to allow participation by Plaintiff in the programs at Lorton, the warrant is being held in abeyance, perhaps until shortly before the expiration of the present sentence when once again it would be placed as a detainer against Plaintiff.

Defendant Johnston explained in his affidavit that "the reason for filing the detainer in this case and the decision to let it stand was to notify Lorton officials that the Board intended to take Plaintiff into custody as a parole violator" following completion of the pending criminal sentence. While this particular procedure has been held by Courts to be consistent with Fifth Amendment due process requirements, Watson v. Neff, 383 F.2d 397 (5th Cir. 1967), Shelton v. United States Board of Parole, 128 U.S. App. D.C. 311, 388 F.2d 567 (1967), the use of the warrant as a detainer is merely *one* discretionary matter among several steps the Board of Parole must take

in its determination whether or not to revoke parole. It is of paramount importance that the Board not simply stop in its review of an alleged parole violation at the detainer stage but continue with the critical decision of whether he has violated the terms of his parole and, if he has, what measures are appropriate both in terms of the community and the parolee himself. In the case at bar, the Board took steps to protect the community by detaining Plaintiff after release from the pending sentence. However, the Board failed to follow up with speedy adjudication of Plaintiff's alleged parole violation and therein lies the crux of this case.

Plaintiff's due process claim requires a determination of whether, on the facts of this case, the Board's failure to hold a revocation hearing constitutes a violation of Plaintiff's Fifth Amendment right to due process of law. The Court's response is affirmative. The United States Court of Appeals for the District of Columbia Circuit has firmly established that "the issuance of a violator warrant triggers a process which, as a matter of fundamental fairness, must be pursued with reasonable diligence and with reasonable dispatch." Shelton v. United States Board of Parole, *supra*. The necessity of a prompt revocation hearing to avoid the loss of witnesses or documentary evidence, or to prevent unnecessary limitations on personal liberty was exempted by the Court in *Shelton, supra*, where, as here, the warrant cites a criminal conviction as the reason for revocation. However, we agree with the Court in *Sutherland*,

supra, which voiced the opinion that *Shelton*, in part, "misconceives the duties of the Parole Board and permits the imposition of substantial deprivations without due process of law." 366 F.Supp. at 272.

To the extent that *Shelton* permits the Board of Parole to deny a revocation hearing to a parolee whose parole violation has been established by a criminal conviction, *Shelton* has been effectively overruled by the Supreme Court's decision in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). See Sutherland v. D. C. Board of Parole, *supra*. The Court in *Morrissey* was concerned with the nature of the due process that must be afforded a parolee once he is arrested and detained for alleged parole violations. The Court held that the Due Process clause of the Fourteenth Amendment requires a prompt preliminary hearing once a parolce is arrested and detained for violation of parole. The purpose of such hearing is "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." *Morrissey, supra*, at 485, 92 S.Ct. at 2602. Once the question of probable cause is resolved, the Court found that a formal revocation hearing, if desired by parolee, is required within a reasonable time after the parolee is taken into custody.

This latter due process requirement of a timely revocation hearing provides the parolee with "an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that

circumstances in mitigation suggest that the violation does not warrant revocation." *Morrissey, supra*, at 488, 92 S.Ct. at 2603. It is the Court's opinion that such requirement is dispositive of Plaintiff's contention that he was entitled to a prompt revocation hearing on the parole violation warrant.

Although petitioners in *Morrissey*, unlike the Plaintiff here, were not convicted of crimes while on parole, the Court emphasized in *Morrissey* the need to provide a forum for the parolee, at the least, to introduce evidence of mitigating circumstances where the violation itself is conceded.

Accordingly, it is clear that under *Morrissey* Plaintiff at bar had a right to a revocation hearing and was unreasonably denied the exercise of such right throughout his current three-year period of incarceration.

The unjustified delay in providing Plaintiff with a parole revocation hearing requires, in the interest of justice, that the Court cancel the parole violation warrant. See Sutherland v. D. C. Board of Parole, *supra;* Marchand v. Director, U. S. Probation Office, 421 F.2d 331, 335 n.5 (1st Cir. 1970).

Therefore, the Court will deny Defendant's Motion to Dismiss and direct Defendant to cancel the Board's warrant for parole violation against Plaintiff in accordance with the Order of even date entered herewith.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 73-2018

March 13, 1974

EDWARD J. FITZGERALD et al., PETITIONERS

v.

MAURICE J. SIGLER et al., RESPONDENTS

MEMORANDUM AND ORDER

CORCORAN, District Judge.

I

This action is before the Court on petitioners' amended petitions for writs of habeas corpus and mandamus. Jurisdiction is premised upon 28 U.S.C. §§ 2241 and 1361, respectively.

Each petitioner is an inmate at the District of Columbia Correctional Complex at Lorton, Virginia; each is incarcerated there pursuant to a sentence imposed by a judge of this Court; and each has lodged against him a detainer from the United States Board of Parole based upon an unexecuted parole violator warrant.

The respondents are the members of the United States Board of Parole (the Board), the Parole Executive of the Board (Johnston), the Director of Dis-

trict of Columbia Department of Corrections (Jackson), and the Superintendent (warden) of the Lorton Correctional Complex (Strickland).

Petitioners seek a declaration that they have been denied their rights to a speedy parole revocation hearing in contravention of the due process clause of the Fifth Amendment to the Federal Constitution and the recent Supreme Court pronouncements of *Morrissey* v. *Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and *Gagnon* v. *Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Further petitioners move this Court to issue an order quashing their parole violator warrants and discharging them from future custody pursuant to such warrants, or, alternatively, ordering the respondent Board to hold speedy parole revocation hearings.

The failure to grant them a speedy parole revocation hearing, according to the petitioners, affects them adversely in two important respects:

(1) In the case of each petitioner the sentencing judge in this Court ordered the sentence imposed by him to run concurrently with any other sentence being served by the petitioner. The petitioners allege that by deferring action on the parole violation warrant and thus deferring the running of the original unexpired sentence until completion of the intervening sentence imposed by this Court, the Board is causing the unexpired sentence to run consecutively to the intervening sentence imposed by a judge of this Court, thus frustrating the clear intention of that sentencing judge; and

(2) the petitioners assert that because the detainers have been placed against them the District of Columbia prison officials arbitrarily deny them access to certain rehabilitative programs, in violation of the requirements of due process and equal protection.

Pursuant to *Fed. R. Civ. P.* 23, the petitioners seek to have their suit declared a class action on behalf of two classes: (1) all prison inmates who have unexecuted parole violator warrants issued by the respondent Board of Parole and pending against them; and (2) all inmates at Lorton who have detainers lodged against them, and who are therefore subject to a so-called Policy 5000 of the District of Columbia Department of Corrections, which, in petitioners' view, arbitrarily denies them the opportunity to participate in rehabilitative programs.[1]

II

We look first at the status of each petitioner.

A. *Fitzgerald*

Petitioner Fitzgerald is presently serving a sentence entered August 31, 1972, of from 3 to 12 years

[1] Since this case was taken under advisement, counsel for petitioners and the district respondents have stipulated that Policy 5000 has been superseded by Department Notice 4090, issued over the signature of respondent Jackson. Notice 4090 by its terms, is binding upon the District of Columbia and affords the petitioners all relief requested as to this aspect of the case. Accordingly, for purposes of the case, claims based upon Policy 5000 have been mooted.

for a robbery conviction in the United States District Court for the District of Columbia. This sentence was stated to "run concurrently with any other sentence that you might be exposed to."

Previously, in November, 1963, Fitzgerald had been convicted of bank robbery in the United States District Court for the Middle District of Pennsylvania. In that case he was sentenced to a term of 10 years, but was released after serving 7 years and 1 month on mandatory good-time release pursuant to 18 U.S.C. § 4164, as if paroled. On July 27, 1970, the respondent Board issued a parole violator warrant alleging that Fitzgerald had failed to report for supervision.

After his arrest on the charge which led to his 1972 robbery conviction in this Court, the warrant was lodged as a detainer against him and was updated to include the allegation of committing an offense while on parole. Since the 1972 conviction and sentencing in this Court, the detainer has remained lodged against Fitzgerald. There was a dispositional review [2] of his case, following which the Board de-

[2] The Affidavit of Maurice H. Sigler, Chairman, United States Board of Parole, defines "dispositional review" in this manner:

> When the Board requests that a parole or mandatory release violator warrant be placed as a detainer against an alleged parole or mandatory release violator in custody as a result of a new criminal offense, the Board periodically conducts dispositional reviews of the warrant to determine whether the detainer should be allowed to remain in effect or whether the warrant should be with-

cided to allow the detainer to stand without further action. Fitzgerald was notified that action would be taken on the detainer at the time he is taken into custody as a federal violator when released from his present incarceration.

B. *Kelley*

Petitioner Kelley is presently serving a sentence of from 3 to 15 years imposed by the United States District Court for the District of Columbia on August 8, 1972, after conviction for armed robbery. The sentencing judge directed that the sentence was to run concurrently with any other sentence then being served.

Kelley had previously been convicted on January 21, 1963, of armed robbery of a post office in the United States District Court for the Eastern District of Missouri, and sentenced to a term of 25 years. After serving eight years of that sentence, Kelley was released on parole on June 3, 1971.

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drawn or executed. The initial dispositional review of a case is instituted by a request of the prisoner or on the Board's own initiative. It is presently the practice of the Board to conduct subsequent dispositional reviews of each case on an annual basis. If the warrant is executed, the Board will take action to conduct a prompt revocation hearing. In the dispositional review, *which is based on the written record only*, the Board specifically analyzes the factors enumerated in the attached Parole Form H-3(a), Summary by Case Analyst-Dispositional Review, in light of the prisoner's record as a whole .... (Emphasis supplied.)

On June 23, 1972, Kelley was convicted in the Superior Court of the District of Columbia of attempted robbery and sentenced to a term of 1 to 3 years.

On July 7, 1972, a parole violator warrant was lodged against Kelley as a detainer by the Board. It was based upon the conviction of attempted robbery in Superior Court and the pending armed robbery charge in this Court, *supra*. Since August, 1972, the detainer, now based on the two convictions in this and the Superior Court has remained lodged against Kelley at Lorton. Following dispositional review[8] of the case, the Board decided to allow the detainer to stand and, as in the case of Fitzgerald, notified Kelley that action would be taken on the detainer at the time he is taken into custody as a federal violator when released from his present incarceration.

C. *Byrd*

Petitioner Byrd is presently serving a sentence of from 4 to 20 years imposed for an armed robbery conviction entered July 6, 1972, in the United States District Court for the District of Columbia. This sentence was to run concurrently with any other sentence being served.

Byrd had previously been convicted of robbery in this Court on May 28, 1965, and sentenced to a term of 3 to 12 years. After serving 6 years and 1 month he was paroled on June 14, 1971. Since the July,

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[8] *See* note 2 *supra*.

1972, armed robbery conviction and sentencing, a detainer has remained lodged against Byrd while at Lorton. The Board, following dispositional review [4] of the case, notified Byrd that the detainer would stand and that no action would be taken on the detainer until the time he is taken into custody as a federal violator when released from his present incarceration.

III

In their answer and return to the order to show cause, the Federal respondents challenge the jurisdiction of this Court to grant relief by way of habeas corpus on the grounds (a) that the "custody" requirement is lacking since it is based only on a parole violator detainer; and (b) that the District of Columbia is an inappropriate forum for adjudicating these petitioners' claims.

A. *Custody*

The Board's contention that a parole violator detainer does not provide the necessary "in custody" requirement for federal habeas corpus relief is clearly without merit. It is well settled that the "prematurity doctrine" of *McNally* v. *Hill*, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934), which would have precluded any relief for petitioners, has been discarded by the Supreme Court in *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 488-489, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973); *Peyton*

[4] *See* note 2 *supra*.

v. *Rowe*, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968). Thus petitioners' detainers are restraints and the "in custody" requirement is met. *See also Sutherland* v. *District of Columbia Board of Parole*, 366 F.Supp. 270 (D.D.C., 1973). *Cf. Hensley* v. *Municipal Court*, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973); *Jones* v. *Cunningham*, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963).

B. *Forum*

The Court finds that the District of Columbia is is the appropriate and most convenient forum in which to adjudicate the claims of these individual petitioners. Since Lorton is the penal institution commonly utilized by prisoners convicted in the District of Columbia, and since each of these petitioners is presently incarcerated there pursuant to a sentence imposed by a judge of this Court, these petitioners have the requisite significant contacts with this forum to seek in it a writ of habeas corpus. Hayes v. Chairman, United States Board of Parole, 160 U.S. App.D.C. ——, 492 F.2d 669 (1974), *citing Braden* v. *30th Judicial Circuit Court of Kentucky*, *supra*, and *Eisel* v. *Secretary of the Army*, 155 U.S.App. D.C. 366, 477 F.2d 1251 (1973).

In *Sanders* v. *Bennett*, 80 U.S.App.D.C. 32, 148 F.2d 19 (1945), the Court held that only a court having jurisdiction over the warden of the penitentiary where the prisoner is detained could grant a writ of habeas corpus to that prisoner. The Court further held

> since the rule is a practical one based on common sense administration of justice we have held that the courts in the District of Columbia may issue writs of habeas corpus directed to those in direct charge of penal institutions of the District which happen to be located just outside its borders. This is because it is the plain duty of the District to adjudicate matters arising out of the conduct of its own institutions. *Id.* at 33, 148 F.2d at 20.

Although *Sanders* was to some extent modified three years later by *Ahrens* v. *Clark*, 335 U.S. 188, 68 S.Ct. 1443, 92 L.Ed. 1898 (1948), in which the Supreme Court restricted habeas corpus jurisdiction to that district within whose territory the petitioner was confined, *Ahrens*, in turn, has been significantly modified by *Braden*, *supra*. *Braden* held that the issuing district court need only have jurisdiction over the petitioner's custodian, thereby reviving the precedential value of *Sanders* v. *Bennett*, *supra*.

> Read literally, the language of § 2241(a) requires nothing more than the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, *even if the prisoner himself is confined outside the court's territorial jurisdiction.* Braden v. 30th Judicial Circuit Court of Kentucky, *supra*, 410 U.S. at 495, 93 S.Ct. at 1130 (emphasis supplied).

Braden established a balancing-of-interests test, "in terms of traditional venue considerations," which looks to the "most desirable forum for the adjudication of the (habeas) claim." *Id.* at 493, 93 S.Ct. at 1129. The *Braden* rule has been adopted by this Circuit in *Eisel* v. *Secretary of the Army*, *supra*. *See also Orito* v. *Powers*, 479 F.2d 435 (7th Cir. 1973); *Henry* v. *Warner*, 357 F.Supp. 495, 502 (C.D.Cal. 1973). While in the case under consideration, concurrent jurisdiction may exist in both the District Court for the Eastern District of Virginia and this Court, *see Braden*, *supra*, 410 U.S. at 499 n.15, 93 S.Ct. at 1131, traditional venue considerations dictate that the District of Columbia is the more desirable forum for adjudication of habeas claims by prisoners convicted and sentenced in the District Court for the District of Columbia, *Cf. Strait* v. *Laird*, 406 U.S. 341, 92 S.Ct. 1693, 32 L.Ed.2d 141 (1972).

Accordingly, this Court exercises jurisdiction over the petitioners' custodian, the Federal respondents. All the material events concerning their intervening offenses, convictions and sentencings took place in the District; the pertinent records are more likely to be found here; and this forum is presumably more convenient for the respondents and, at the least, no less convenient for the petitioners.

IV

The District of Columbia respondents also assert that this Court lacks jurisdiction to entertain the claims of these petitioners. They allege various

grounds, *viz.*, (a) that jurisdiction in this Court is precluded by *D.C.Code Ann.* § 11-921(a)(3)(A)(iii) and § 16-1901 (1973), which declare that petitions for writs of habeas corpus directed to any person other than Federal officers and employees shall be filed in the Superior Court of the District of Columbia; (b) that respondent Jackson is an improper party since he is not the immediate custodian of petitioners; (c) that this Court should not interfere with internal prison management; (d) that to require hearings, as petitioners seek, whenever a classification review results in leaving the classification unchanged, would unnecessarily burden the administrative process of reviewing classifications.

A. *Place of Confinement*

D.C.Code Ann. § 16-1901(a) (1973) provides that a person be "committed, detained, confined, or restrained from his lawful liberty within the District" before a writ of habeas corpus may be entertained in any court in the District of Columbia. That section has been construed literally by the District of Columbia Court of Appeals in I. B. v. District of Columbia Dept. of Hum. Res., S. S. Adm., 287 A.2d 827, 828-829 (D.C.Ct.App. 1972), to mean that a petitioner must be confined within the territorial jurisdiction of the District. The District of Columbia Court of Appeals read *Ahrens* v. *Clark*, *supra*, to mandate such a holding. But as is pointed out in Part III *supra*, *Ahrens* was modified by *Braden* v.

30th Judicial Circuit Court of Kentucky, *supra*, and is no longer dispositive. While this Court recognizes that the District of Columbia Court Reorganization Act of 1970[5] established the District of Columbia Court of Appeals as the "highest court of the District of Columbia," *D.C.Code Ann.* § 11-102 (1973), and that the "greatest deference (should be accorded its) decisions," *see* M.A.S., Inc. v. Van Curler Broadcasting Corp., 357 F.Supp. 686, 690 (D.D.C. 1973), in light of the intervening Supreme Court decision in *Braden* we are constrained to find that I. B. v. District of Columbia Dept. of Hum. Res., S.S. Adm., *supra*, does not govern the case at bar, and that we are bound to follow *Braden*. Accordingly, the Court finds that petitioners are "confined" within the District.

B. *Federal Jurisdiction*

According to *D.C.Code Ann.* § 11-921(a)(3)(A)(iii) and § 16-1901(b), (c), only petitions for writ of habeas corpus directed to Federal officers and employees may be heard by this Court, and all other such writs must be filed in the Superior Court of the District of Columbia. The District of Columbia respondents, Jackson, the Director of the D.C. Department of Corrections, and Strickland, Superintendent (warden) of the Lorton Correctional Complex, maintain that those sections deprive this Court of jurisdiction over them. Strickland's reliance on those provisions is, in the opinion of this Court, misplaced, for it is well settled in the Federal courts that a

[5] Pub.L.No. 91-358, Tit. I, 84 Stat. 473 (1970).

custodian of a federal prisoner is the "keeper of the United States," Randolph v. Donaldson, 13 U.S. (9 Cranch) 76, 86, 3 L.Ed. 662 (1815). For purposes of § 16-901(b), then, the actual custodian of these petitioners, Strickland, is an "officer or employee of the United States." Reid v. Covert, 351 U.S. 487, 489-490, 76 S.Ct. 880, 882, 100 L.Ed. 1352 (1956).[6] *See also* Bland v. Rodgers, 332 F.Supp. 989, 990 (D.D.C. 1971).

The Court, however, agrees that the respondent Jackson, the Director of the District of Columbia Department of Corrections, is not a proper party to this litigation since he is not the immediate custodian of the petitioners. *Sanders* v. *Bennett*, *supra*, 80 U.S.App.D.C. at 33, 148 F.2d at 20. Accordingly, the amended petition for writ of habeas corpus must be dismissed as to respondent Jackson, and the show cause order discharged.[7]

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[6] In citing *Reid supra*, the Court is not unaware that it was later reversed on the merits. Reid v. Covert, 354 U.S. 1, 77 S.Ct. 122, 1 L.Ed.2d 1148 (1957). The first *Reid* case is cited herein, however only for its jurisdictional statement concerning the federal officer-employee issue. In any event, in the opinion of the Court, both *Reid* cases are supportive of the proposition that a custodian of federal prisoners is for limited purposes a federal officer or employee. That conclusion becomes increasingly clear when one realizes that the second *Reid* case, in 1957, affirmed the District Court's granting of habeas corpus relief to a federal prisoner in the District of Columbia Jail. Therefore, in both *Reid* cases, for it to reach the merits, the Court in each instance must have found the warden of the District of Columbia Jail to be a federal officer or employee for purposes of 28 U.S.C. § 1252.

[7] Respondent Jackson, however, as Director of the District of Columbia Department of Corrections, would be a proper party in petitioners' mandamus action, were the Court to find that form of relief applicable in the case at bar. However, the Court has found the Policy 5000 issue to be moot, and therefore, the Court need not reach the mandamus question.

C. *Prison Management*

The District of Columbia asserts that this Court should not interfere with what it views as "internal prison management." Such a contention, in light of the facts of this case and the relevant case law, has no merit. *See Bland* v. *Rodgers*, *supra*, 332 F. Supp. at 992-993 and cases cited therein.

D. *The Administrative Burden*

The Court accords little weight to respondents' last contention that the requested hearings by petitioners would unnecessarily burden the administrative process of reviewing prisoner classifications. Such a view, as will be seen *infra*, ignores the plain mandate of Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

V

We turn now to a consideration of the remedial action requested by the petitioners.

Each petitioner seeks one of three remedies; namely:

(1) An order quashing the detainer. Such an order, of course, would effectively preclude any imposition by the Board of petitioners' original, unexpired sentences.

(2) An order requiring the Board to hold a speedy parole revocation hearing meeting the standards prescribed by *Morrissey* v. *Brewer*, *supra*. If that course is followed, "the parole board has a wide choice of dispositional [8] alternatives," Shelton v. United States Board of Parole, 128 U.S.App.D.C. 311, 319, 388 F.2d 567, 575 (1967). It may, as *Shelton* delineates: (a) withdraw the detainer, thus wiping out any allegation of parole violation; or (b) revoke parole, thereby causing the unexpired portion of the original sentence to run concurrently with the intervening sentence; or (c) continue the detainer, thus withholding revocation until the intervening sentence has been completed. This latter alternative usually results in the serving of consecutive sentences: *i.e.*, the intervening sentence is followed by service of the unexpired sentence. *Id.*

(3) An order requiring the Board to run concurrently the intervening and unexpired sentences, thus complying with, it is asserted, the instructions of the sentencing judges who in fact imposed such sentences.

The Board's authority to issue warrants and lodge detainers is wholly statutory. *See* 18 U.S.C. § 4205 (1970). To implement its authority, the Board has promulgated certain regulations. 28 C.F.R. § 2.40 (1973). It is well settled that the Board is vested

[8] *Compare* note 2 *supra*. "Dispositional" as used in *Shelton* clearly contemplates the final revocation hearing mandated by Morrissey v. Brewer, *supra*, whereas "dispositional" as defined by the Board falls far short of the *Morrissey*-type hearing. See discussion *infra*.

with discretionary power. Zerbst v. Kidwell, 304 U.S. 359, 58 S.Ct. 872, 82 L.Ed. 1399 (1938); *Shelton* v. *United States Board of Parole*, *supra*. That discretion, however, is not "immune from judicial overview." *Id. Cf.* Hyser v. Reed, 115 U.S.App.D.C. 254, 269, 318 F.2d 225, 240 (1963).

We look first to the claim embodied in the third alternative, *supra*, that the Board of Parole has usurped the power of the sentencing judge by preventing the intervening and unexpired sentences from running concurrently. However, the case law will not support such an assertion and under the doctrine of *stare decisis* we are constrained to hold to the contrary. Tippitt v. Wood, 78 U.S.App.D.C. 332, 140 F.2d 689 (1944); Hammerer v. Huff, 71 App. D.C. 246, 110 F.2d 113 (1939). *See also* Cox v. Feldkamp, 438 F.2d 1, 3 (5th Cir. 1971); Edwards v. United States, 422 F.2d 856, 858 (6th Cir. 1970); Moore v. Smith, 412 F.2d 720, 724 (7th Cir. 1969); Mock v. U.S. Board of Parole, 120 U.S.App.D.C. 248, 250, 345 F.2d 737, 739 (1965) (Fahy, J.).[9] *Cf. Zerbst* v. *Kidwell*, *supra*; Noll v. Board of Parole for the District of Columbia, 89 U.S.App.D.C. 206, 191 F.2d 653 (1951) (Bazelon, J.).

[9] *But see* Shelton v. United States Board of Parole, *supra*, 128 U.S.App.D.C. at 318-319 n. 12, 388 F.2d at 574-575 n. 12, where the court indicated, seemingly inconsistent with and without reference to *Tippitt*, *Hammerer* or *Mock*, that when a district judge sentences a person to a consecutive term, the Board is "thereby precluded from any dispositional alternative involving what is essentially concurrent sentence treatment."

In *Tippitt*, as in the instant case, the petitioner had committed a criminal offense while on parole from a previous conviction. For the new offense, the district court imposed a sentence that required the intervening sentence and the unexpired portion of the original sentence to run concurrently with each other. The appellate court in *Tippitt*, however, ruled the sentence invalid and held that the sentencing judge had no power to make the intervening sentence run concurrently with the original, unexpired sentence or, moreover, to tell the Board how it must act in light of the intervening sentence. 78 U.S.App.D.C. at 335, 140 F.2d at 692.

In *Hammerer*, on similar facts, the court held that the "trial judge in imposing the second sentence had no power to cause it and the unexpired portion of the first sentence to run concurrently." 71 App. D.C. at 249, 110 F.2d at 116.

And in *Cox* v. *Feldkamp*, *supra*, 438 F.2d at 3, the court held:

> The Parole Board has the administrative power to decide whether or not to allow a sentence for an offense committed while on parole to run concurrent with time to be served on parole violation. The power of the Board is exclusive. (Citation omitted.)

Accordingly, the Court denies relief under petitioners' third request, *supra*.

The first alternative, however, has more merit. For it is now beyond peradventure that, consistent with due process, a parolee must be accorded a final hearing within a reasonable time after he has been taken

into custody to determnie whether he has, in fact, violated his parole conditions and whether his parole should be revoked. *Morrissey* v. *Brewer*, *supra*; Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). *Cf. Shelton* v. *United States Board of Parole*, *supra*, 128 U.S.App.D.C. at 318, 388 F.2d at 574.

The opinion in *Morrissey* was handed down June 29, 1972. Each petitioner herein received his intervening sentence for a criminal conviction arising out of criminal conduct while on parole status, in either July or August 1972. To date none of these petitioners has been tendered a final parole revocation hearing as required by *Morrissey*. When the Court in *Morrissey* suggested that a two month delay between the hearing date and the date the parolee is taken into custody might be reasonable, 408 U.S. at 488, 92 S.Ct. at 2604, it left little room for doubt that a delay of over one and one-half years, as in this case, would be unjustified, and it follows that "it is now too late for (respondents) to cure (their) error by affording (petitioners) a revocation hearing." *Sutherland* v. *District of Columbia Board of Parole*, *supra*, 366 F.Supp. at 272.

The respondents would distinguish the instant case from *Morrissey* by limiting the latter solely to its own facts, which did not deal with a parolee in custody by reason of a criminal conviction. However, that the Court was mindful of such a parolee is indicated by a remark made in the course of delineating the limits of the due process hearing: "Obviously

a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime." 408 U.S. at 490, 92 S.Ct. at 2605. To this Court the plain import of that language is that the mandate of a prompt, final revocation hearing is not obviated, but only that the content of such a hearing might be altered, by the fact of a conviction while on parole. For instance, the first-stage preliminary hearing required by *Morrissey* would surely be met by the fact of the intervening conviction and sentence. But according to *Morrissey*, there would have to be a second-stage final hearing in all cases and within a reasonable time to satisfy due process.

In view of the above, then, it seems clear that the Board no longer has any discretion as to whether to grant a prompt parole revocation hearing. Such discretion as is lodged in the Board is related to what disposition to make in each case after and as a result of the hearing. But there must be a final hearing.

As noted above the facts of this case indicate that the Board did not tender such hearings to these petitioners within a reasonable time after they were taken into custody. The detainers and warrants must be quashed.[10]

IV

Petitioners also seek to have their suit certified as a class action under *Fed. R. Civ. P.* 23 and Local Rule 1-13(b). They claim relief for two alleged

[10] *But see Cook* v. *United States Attorney General*, 488 F.2d 667 (5th Cir. 1974).

classes, namely, (1) all prison inmates who have unexecuted parole violator warrants issued by the United States Board of Parole pending against them; and (2) all persons subject to Policy 5000.

The Court is of the opinion that class relief in the fact situation here presented is inappropriate and must be denied. As to the first proposed class, it is too broad to be considered in a habeas context which invariably requires consideration of facts unique to the individual seeking the writ and consequently deprives that individual of standing as a representative of a proposed class. We need only point out for example, in the instant case, that the relief granted to the individual petitioners, conditioned as it is upon their significant contacts with this forum and other individual considerations, *see* Part III *supra*, cannot be made available to all prison inmates against whom parole violator warrants have been lodged, if for no other reason than that this Court cannot extend its territorial habeas jurisdiction to reach all such persons. Further, as an example of the inappropriateness of class treatment in the context of the particular case, absent a holding that *Morrissey* is to be applied retroactively—a question this Court is not called upon to, and does not, decide —those prisoners as to whom a detainer was lodged prior to *Morrissey* are clearly not in the same class as these petitioners whose detainers were updated after *Morrissey*.

As to the second proposed class, *i.e.*, those inmates subject to the provisions of Policy 5000, *see* note 1 *supra*. The question has been mooted.

VII

Accordingly, it is this 13th day of March, 1974,

Ordered that the unexecuted parole violator warrant lodged against the petitioner Fitzgerald by reason of his conviction in this Court in Criminal Case No. 71-1044 be, and the same is hereby, quashed; and it is

Further ordered that the unexecuted parole violator warrant lodged against petitioner Kelley by reason of his conviction in Superior Court Criminal Case No. 16534-72A and his conviction in this Court in Criminal Case No. 72-1102 be, and the same is hereby, quashed; and it is

Further ordered that the unexecuted parole violator warrant lodged against petitioner Byrd by reason of his conviction in this Court in Criminal Case No. 72-34 be, and the same is hereby, quashed; and it is

Further ordered that the respondent Strickland shall withdraw from the petitioners' files the detainers lodged against them as a result of the foregoing unexecuted parole violator warrants; and it is

Further ordered that the amended petition for a writ of habeas corpus be, and the same is hereby, dismissed as to respondent Jackson, and the order to

show cause be, and the same is hereby, discharged as to him; and it is

Further ordered that the motion to certify this action as a class action pursuant to *Fed. R. Civ. P.* 23 be, and the same is hereby, denied.

APPENDIX F

1. 18 U.S.C. (1970 ed.) 4205 provided:

> A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve.

2. 18 U.S.C. (1970 ed.) 4207 provided:

> A prisoner retaken upon a warrant issued by the Board of Parole shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board.
>
> The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof.
>
> If such order of parole shall be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced.

3. The Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 227-230, amending 18 U.S.C. 4214, provides in pertinent part:

> (a)(1) Except as provided in subsections (b) and (c), any alleged parole violator summoned

> or retaken under section 4213 shall be accorded the opportunity to have—
>
> (A) a preliminary hearing at or reasonably near the place of the alleged parole violation or arrest, without unnecessary delay, to determine if there is probable cause to believe that he has violated a condition of his parole; and upon a finding of probable cause a digest shall be prepared by the Commission setting forth in writing the factors considered and the reasons for the decision, a copy of which shall be given to the parolee within a reasonable period of time; except that after a finding of probable cause the Commission may restore any parolee to parole supervision if:
>
> (i) continuation of revocation proceedings is not warranted; or
>
> (ii) incarceration of the parolee pending further revocation proceedings is not warranted by the alleged frequency or seriousness of such violation or violations;
>
> (iii) the parolee is not likely to fail to appear for further proceedings; and
>
> (iv) the parolee does not constitute a danger to himself or others.
>
> (B) upon a finding of probable cause under subparagraph (1)(A), a revocation hearing at or reasonably near the place of the alleged parole violation or arrest within sixty days of such determination of probable cause except that a revocation hearing

may be held at the same time and place set for the preliminary hearing.

(2) Hearings held pursuant to subparagraph (1) of this subsection shall be conducted by the Commission in accordance with the following procedures:

(A) notice to the parolee of the conditions of parole alleged to have been violated, and the time, place, and purposes of the scheduled hearing;

(B) opportunity for the parolee to be represented by an attorney (retained by the parolee, or if he is financially unable to retain counsel, counsel shall be provided pursuant to section 3006A) or, if he so chooses, a representative as provided by rules and regulations, unless the parolee knowingly and intelligently waives such representation.

(C) opportunity for the parolee to appear and testify, and present witnesses and relevant evidence on his own behalf; and

(D) opportunity for the parolee to be apprised of the evidence against him and, if he so requests, to confront and cross-examine adverse witnesses, unless the Commission specifically finds substantial reason for not so allowing.

For the purposes of subparagraph (1) of this subsection, the Commission may subpena witnesses and evidence, and pay witness fees as established for the courts of the United States. If a person refuses to obey such a subpena, the Commission may petition a court of the United

States for the judicial district in which such parole proceeding is being conducted, or in which such person may be found, to request such person to attend, testify, and produce evidence. The court may issue an order requiring such person to appear before the Commission, when the court finds such information, thing, or testimony directly related to a matter with respect to which the Commission is empowered to make a determination under this section. Failure to obey such an order is punishable by such court as a contempt. All process in such a case may be served in the judicial district in which such a parole proceeding is being conducted, or in which such person may be found.

(b)(1) Conviction for a Federal, State, or local crime committed subsequent to release on parole shall constitute probable cause for purposes of subsection (a) of this section. In cases in which a parolee has been convicted of such a crime and is serving a new sentence in an institution, a parole revocation warrant or summons issued pursuant to section 4213 may be placed against him as a detainer. Such detainer shall be reviewed by the Commission within one hundred and eighty days of notification to the Commission of placement. The parolee shall receive notice of the pending review, have an opportunity to submit a written application containing information relative to the disposition of the detainer, and, unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section to assist him in the preparation of such application.

(2) If the Commission determines that additional information is needed to review a detainer, a dispositional hearing may be held at the institution where the parolee is confined. The parolee shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel as provided in subsection (a) (2) (B) of this section.

(3) Following the disposition review, the Commission may:

(A) let the detainer stand; or
(B) withdraw the detainer.

(c) Any alleged parole violator who is summoned or retaken by warrant under section 4213 who knowingly and intelligently waives his right to a hearing under subsection (a) of this section, or who knowingly and intelligently admits violation at a preliminary hearing held pursuant to subsection (a) (1) (A) of this section, or who is retaken pursuant to subsection (b) of this section, shall receive a revocation hearing within ninety days of the date of retaking. The Commission may conduct such hearing at the institution to which he has been returned, and the alleged parole violator shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel or another representative as provided in subsection (a) (2) (B) of this section.

(d) Whenever a parolee is summoned or retaken pursuant to section 4213, and the Commission finds pursuant to the procedures of this section and by a preponderance of the evidence that the parolee has violated a condition of his

parole the Commission may take any of the following actions:

(1) restore the parolee to supervision;
(2) reprimand the parolee;
(3) modify the parolee's conditions of the parole;
(4) refer the parolee to a residential community treatment center for all or part of the remainder of his original sentence; or
(5) formally revoke parole or release as if on parole pursuant to this title.

The Commission may take any such action provided it has taken into consideration whether or not the parolee has been convicted of any Federal, State, or local crime subsequent to his release on parole, and the seriousness thereof, or whether such action is warranted by the frequency or seriousness of the parolee's violation of any other condition or conditions of his parole.

(e) The Commission shall furnish the parolee with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the revocation hearing. If parole is revoked, a digest shall be prepared by the Commission setting forth in writing the factors considered and reasons for such action, a copy of which shall be given to the parolee.

4. The United States Board of Parole's regulation relating to detainers at the time of the Court of Appeals decision, 28 C.F.R. 2.53 (1975), provided:

(a) In those instances where the prisoner is serving a new sentence in an institution, the

warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. At such dispositional interview the prisoner may be represented by counsel of his own choice and may call witnesses in his own behalf, provided he bears their expenses. He shall be given timely notice of the dispositional interview and its procedure.

(b) Following the dispositional review the Regional Director may:

(1) Let the detainer stand;

(2) Withdraw the detainer and close the case if the expiration date has passed;

(3) Withdraw the detainer and reinstate to supervision, thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release;

(4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.

(c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct annual review relative to

the disposition of the warrant. These decisions will be made by the Regional Director. The Board shall request periodic reports from institution officials for its consideration.

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